TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 128

THE UNITED STATES OF AMERICA, APPELLANT

vs.

SHELBY IRON COMPANY OF NEW JERSEY AND SHELBY IRON COMPANY OF ALABAMA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

FILED MAY 16, 1927

(31325)

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[Caption omitted.]

1 In United States District Court, Northern District of Alabama, Southern Division

UNITED STATES OF AMERICA

vs.

SHELBY IRON COMPANY, A CORPORATION ET AL.

Bill of complaint

(Filed May 4, 1923)

To the Honorable William I. Grubb, Judge of the District Court of the United States for the Southern Division of the Northern District of Alabama:

The United States of America, by C. B. Kennamer, its United States attorney for the said Northern District of Alabama, brings this, its bill of complaint against the Shelby Iron Company, a corporation organized under the laws of the State of New Jersey, and whose principal place of business is now at Birmingham, Alabama, and whose president is Morris W. Bush, Number 1719 American Trust Building, Birmingham, Alabama, and the Shelby Iron Company, a corporation organized under the laws of the State Alabama, and whose president is Morris W. Bush, and whose principal place of business is Number 1719 American Trust Building, Birmingham, Alabama.

2 The said United States of America, complainant, respectfully shows unto the court as follows:

1st. That on the 11th day of June, 1918, the Shelby Iron Company, a corporation of New Jersey, was seized and possessed and had the legal title to the following described real estate situated in Shelby County, Alabama, and within the jurisdiction of this court and described more particularly as follows:

"Beginning at an iron stake in the NW ¼ of SE ¼ of section 13TD 22 range 1 west, Shelby County, Ala., said point being 1655 feet west of the Huntsville Meridian and 1427 feet north of the south line of section 13 to 22 R I W and running thence south 64 degrees 19′ east 550 feet, thence north 25 degrees and 41′ ast 710 feet, thence north 64 degrees 19′ west 550 feet, thence south 25 degrees 41′ west 710 feet to the beginning, containing 8.96 acres.

"STILL HOUSE SITE

"Beginning at an iron stake in the NW ¼ of the SE ¼ of section 13 to 22 range 1 west, Shelby County, Alabama, said point being 2043 feet west of the Huntsville Meridian, and 1342 feet north of

the south line of section 13 to 22 S. range 1 west, and running thence S. 43 degrees and 46′ east 204.4 feet, thence south 1 degree 41′ west 271.2 feet, thence south 69 degrees 54′ west 175.7 feet, thence north 66 degrees 52′ west 223.2 feet, thence north 31 degrees
3 11′ east 458 feet to the beginning, containing 2.50 acres."

Strip connecting retort site and still house sites:

"Beginning at a point in the south line of the retort building site, theretofore described, said point being 158 feet south east of the south west corner of said tract and running thence with the south line of the retort building site south 64 degrees 19′ east 15.5 feet, thence south 68 degrees 40′ west 445 feet to the north line of the still house site, heretofore described, said point beginning 33 feet north west of the north east corner of said tract, and running thence north 43 degrees 46′ west with north line of still house tract 12.5 feet, thence north 68 degrees 40′ east 449 feet to the beginning, containing ⅛ of an acre.

"Also the following parcel of land: Beginning at an iron stake marking the north west corner of the 8.96 acre retort building site, same being in the NE ¼ of SE ¼ of section 13 TP 22 S. range 1 west, Shelby County, Alabama, and running thence with the north line of the retort building site south 64 degrees 19′ east 250 feet, thence north 42 degrees 11′ east 700 feet, thence north 77 degrees 49′ west 100 feet, thence south 62 degrees 41′ west 300 feet, thence south 48 degrees 25′ west 442.6 feet to the beginning, containing in all 3.7 acres."

4 2nd. That on the 11th day of June, 1918, and June 17th, 1918, a certain deed or conveyance of all of the right, title, or interest of the said Shelby Iron Company of New Jersey to the foregoing described real estate was made and delivered to the Shelby Chemical Company, a corporation organized under the laws of the State of Delaware.

3rd. That on the 10th day of April, 1919, the Shelby Chemical Company, a corporation, made and executed and delivered to the United States of America a certain warranty deed, conveying all of its right, title, and interest in and to said lands and all the appurtenances thereunto belonging.

4th. That since the 23rd day of December, 1922, the United States of America has been in peaceable possession of said premises.

5th. That complainant's title to said land is denied or disputed by the defendants and that the defendants are now asserting or claiming to have some right or title or interest in or to said lands or to holding a lien or an incumberance of some kind thereon, and that no suit is pending to enforce or test the validity of such title, claim, or incumberance.

The premises considered, the complainant prays that this honorable court will take jurisdiction of this cause and that the said Shelby Iron Company, a corporation of New Jersey, and that the Shelby Iron Company, a corporation of Alabama, be made respond-

ents hereto, that a subpoena may issue out of this court, directed to said defendants and directing them to plead, answer or
5 demur to this bill within the time allowed by law and within the rules of this honorable court; and upon a final hearing upon pleadings and proof, that a decree may be rendered, decreeing that the defendants have no claim, right, title, interest in, or incumberance upon said real estate described in paragraph one of this bill, and that defendants be forever and perpetually enjoined by this court from further asserting, claiming, or maintaining any right, title, interest, or claim to said described property, and complainant prays for such other, further, and general relief as the equities of this cause may require.

(Signed) A. L. RICHARDSON,
C. B. KENNAMER,
Solicitors for the Complainant, The United States Government.

NOTE.—The respondents, the Shelby Iron Company, a corporation of New Jersey, and the Shelby Iron Company, a corporation of Alabama, is required to answer under oath every paragraph of the foregoing bill from paragraph one to five, inclusive, and every allegation therein.

(Signed) A. L. RICHARDSON,
C. B. KENNAMER,
Solicitors for the Complainant, United States Government.

6 [Summons and marshal's return omitted in printing.]

8 In United States District Court

Answer of Shelby Iron Co. of New Jersey

(Filed May 18, 1923)

THE SEPARATE ANSWER OF SHELBY IRON COMPANY, A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF NEW JERSEY, TO THE BILL OF COMPLAINT FILED IN SAID COURT BY THE UNITED STATES OF AMERICA, AS PLAINTIFF, AGAINST THIS DEFENDANT AND AGAINST THE SHELBY IRON COMPANY, A CORPORATION, ORGANIZED UNDER THE LAWS OF THE STATE OF ALABAMA

Now comes Shelby Iron Company, a corporation organized under the laws of the State of New Jersey, and for answer to the bill of complaint says:

1st. This defendant admits and avers that on the 11th day of June, 1918, it was seized and possessed of and had the legal title to the real estate situated in Shelby County, Alabama, and within the jurisdiction of this court, which is particularly set out and described in the bill.

9 2nd. This defendant denies that on the 11th day of June, 1918, and June 17th, 1918, a certain deed of conveyance of all the right, title, and interest of this defendant to said real estate was

made and delivered to the Shelby Chemical Company, a corporation organized under the laws of the State of Delaware. This defendant is informed and believes and therefore states that on, to-wit, the 11th day of June, 1918, The Shelby Iron Company, a corporation organized under the laws of the State of Alabama, made and executed a deed to said Shelby Chemical Company purporting to convey that part of the real estate mentioned and described in the bill of complaint which ends with the words "containing 1/8 of an acre," and that on, to-wit, the 17th day of June, 1918, The Shelby Iron Company, a corporation organized under the laws of the State of Alabama, executed a deed to the said Shelby Chemical Company purporting to convey that part of the real estate mentioned and described in the bill which begins with the words "also the following parcel of land." Defendant is informed and believes, and therefore states, that the description of said lands as set out in the bill is inaccurate and fails to follow the description contained in the said deeds in the following particulars. The figures 2043, where they occur in the bill, should be 2048, and the figures 445, where they occur in the bill, should be 455. Further answering this defendant says that at the time of the making of said conveyances the grantor therein The Shelby Iron Company, a corporation organized under the laws of the State of Alabama, had no title to or interest in the said
10 real estate or any part thereof and that by said deeds the said Shelby Chemical Company acquired no title to or interest in said real estate or any part thereof.

3rd. This defendant has no knowledge of its own as to the averments contained in the third paragraph of the bill, but is informed and believes that such averments are true. This defendant says, however, that at the time of the making of said conveyances by the said Shelby Chemical Company it had no right, title, or interest in and to said lands, and hence conveyed none to the plaintiff, the United States of America.

4th. This defendant admits that the United States of America has been in peaceable possession of said premises since the 23rd day of December, 1922, as averred in the fourth paragraph of the bill.

5th. Further answering, this defendant says that the title of the plaintiff, the United States of America, to said land is denied and disputed by this defendant and that this defendant does assert and claim to have some right and title and interest in and to said lands for the reasons hereinafter set forth. On, to-wit, the first day of October, 1890, The Shelby Iron Company, a corporation organized under the laws of the State of Alabama, being the owner and in possession of the real estate described in the bill, made and executed a deed conveying to The Alabama Coal and Iron Company, a corporation organized under the laws of the State of New Jersey, said real estate and other real estate. Subsequently and on, to-wit, the 12th day of December, 1891, the name of The Alabama Coal and Iron Company was duly and legally changed by proceedings
11 had under the laws of the State of New Jersey, to the name

Shelby Iron Company, this defendant, and by such name this defendant has ever since been known and called. Defendant further shows that this defendant went into the possession of said real estate under said deed made by The Shelby Iron Company and that this defendant has never parted with the title to said real estate. Defendant says, therefore, that the plaintiff, the United States of America, has no title to said lands, such title resides in this defendant and as defendant is informed and believes and therefore states while the plaintiff is now in possession of said real estate, this defendant is entitled to such possession and the said plaintiff has no good right to hold and retain such possession as against this defendant.

And now having fully answered said bill of complaint, this defendant prays to be hence dismissed with its reasonable costs in this behalf expended.

SHELBY IRON COMPANY,
By MORRIS W. BUSH, *President.*

CABANISS, JOHNSTON, COCKE & CABANISS,
Attorneys for Defendant.

[*Duly sworn to by Morris W. Bush; jurat omitted in printing.*]

12 In United States District Court

Answer of Shelby Iron Co. of Alabama

(Filed May 18, 1923)

THE SEPARATE ANSWER OF THE SHELBY IRON COMPANY, A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF ALABAMA, TO THE BILL OF COMPLAINT FILED IN SAID COURT BY THE UNITED STATES OF AMERICA, AS PLAINTIFF, AGAINST THIS DEFENDANT AND AGAINST SHELBY IRON COMPANY ORGANIZED UNDER THE LAWS OF THE STATE OF NEW JERSEY

13 Now comes The Shelby Iron Company, a corporation organized under the laws of the State of Alabama, and for answer to the said bill of complaint says:

1st. This defendant is informed and believes that it is true that on the 11th day of June, 1918, the Shelby Iron Company, a corporation organized under the laws of the State of New Jersey, was seized and possessed of and had the legal title to the real estate situated in Shelby County, Alabama, which is particularly described in the bill, although as this defendant is informed and believes, and therefore states, there are some inaccuracies in said description.

2nd. This defendant is informed and believes and therefore states that it is not true, as alleged in the bill, that on the 11th day of June, 1918, and June 17, 1918, a certain deed or conveyance of all of the right, title, or interest of said Shelby Iron Company of New Jersey to said real estate was made and delivered to the Shelby Chemical Company, a corporation organized under the laws of the State of Delaware. This defendant avers and states that on, to-wit; the 11th day of June, 1918, this defendant made and executed to the

said Shelby Chemical Company a deed conveying to the said Shelby Chemical Company that certain real estate mentioned and described in the bill which ends with the words "containing 1/8 of an acre," and that on, to-wit, the 17th day of June, 1918, this defendant made to said Shelby Chemical Company a deed conveying that part of the real estate described in the bill beginning with the words "also
14 the following parcel of land." Defendant says, however, that in the description of said real estate as set out in the bill there are the following inaccuracies. The figures 2043 where they occur in the bill should be 2048 and the figures 445 where they occur in the bill should be 455.

3rd. This defendant has no knowledge of its own with respect to the averments contained in the third and fourth paragraphs of the bill, but it is informed and believes that said averments are true.

4th. It is not true that the title of the plaintiff to said lands is denied or disputed by this defendant and it is not true that this defendant is assenting or claiming to have any right, title, or interest in or to said lands or a lien or encumbrance thereon. This defendant is not informed and has no knowledge of its own as to whether any suit is pending to enforce or test the validity of any such title, claim, or encumbrance, as alleged in the bill.

5th. Further answering this defendant says that on, to-wit, the first day of October, 1890, this defendant made and executed a deed conveying to The Alabama Coal and Iron Company, a corporation organized under the laws of the State of New Jersey, all of the real estate owned by this defendant, including the real estate described in the bill of complaint, and that since the making of said deed of conveyance this defendant has had no title to, interest in, or claim upon the real estate described in the bill.

15 And now having fully answered said bill of complaint, this defendant prays to be hence dismissed with its reasonable costs in this behalf expended.

THE SHELBY IRON COMPANY,
By MORRIS W. BUSH,
President.

CABANISS, JOHNSTON, COCKE & CABANISS,
Attorneys for Defendant.

[*Duly sworn to by Morris W. Bush. Jurat omitted in printing*]

16 In United States District Court

[Title omitted.]

Amendment to bill of complaint

(Filed July 24, 1923)

Comes the United States of America, complainant in this cause, and after having first obtained permission of the court, files the following amendment to the original bill, to wit:

After paragraph 2 of the bill by inserting the following paragraph: That on the eleventh day of June, 1918, and June 17, 1918, a certain deed or conveyance of all of the right, title, or interest to said lands mentioned in the first paragraph of the bill so made and delivered to the Shelby Chemical Company, a corporation organized under the laws of the State of Delaware, that in said conveyance it was the true intention of the parties to convey all of the right, title, and interest of the Shelby Iron Company, a corporation of New
17 Jersey, but that through mistake, or fraud, or inadvertence, said conveyance was made and executed from the Shelby Iron Company, a corporation of Alabama.

That the prior of said original bill be amended by adding the following:

That this honorable court will decree that the conveyance made and executed by the said Shelby Iron Company, a corporation of Alabama, be reformed so as to make it a conveyance by the Shelby Iron Company, a corporation of New Jersey, as was the true intent of the parties at the time said conveyance was made by the Shelby Iron Company, a corporation of Alabama.

(Signed) C. B. KENNAMER,
United States Attorney.
(Signed) A. L. RICHARDSON,
Spec. Assist. U. S. Attorney.

18 In United States District Court

[Title omitted.]

Answer to amended bill

(Filed Aug. 2, 1923)

Now comes Shelby Iron Company, a corporation organized under the laws of the State of New Jersey, and for answer to the bill of complaint as amended says:

First. The plaintiff is not entitled as against this defendant to have reformed the said deeds made by the Shelby Iron Company, a corporation organized under the laws of the State of Alabama, for the reason that this defendant was not a party to any of said deeds, the grantor therein being a separate and distinct corporation, this defendant being in no wise responsible for any of the acts or omissions of the Shelby Iron Company, a corporation organized under the laws of the State of Alabama.

19 Second. Defendant further says that plaintiff is not entitled as against this defendant to either a reformation of said deeds or a conveyance by this defendant of the lands described in the bill for the following reasons: Defendant is now and was at the times hereinafter mentioned engaged in the manufacture of charcoal pig iron at its blast furnaces in Shelby County, Alabama, in

which manufacture charcoal was and is a necessary agent. Prior to the 8th day of April, 1918, negotiations were had between the Shelby Chemical Company, a corporation, and this defendant which resulted in the execution of a contract between them, a copy of which is annexed to this answer marked Exhibit "A" and made a part hereof. In and by said contract it was recited and set forth that defendant operated blast furnaces for the manufacture of charcoal pig iron and owned and controlled timber lands on which was growing cord wood, which defendant had been cutting and delivering for carbonization and manufacturing into charcoal by means of kilns and ovens but with no facilities for the recovery of the by-products of such carbonization; that the Shelby Chemical Company was organized for the purpose of manufacturing charcoal and other by-products by modern and improved process of retort distillation and was desirous of erecting a chemical wood distillation plant consisting of retorts, still house, etc., contiguous to the furnaces of defendant; that the manufacture of charcoal by the retort distillation process resulted in the production of a greater number of bushels of charcoal for each cord of wood burned than by the kiln or oven method, then being used by defendant, and that it also resulted in the production of charcoal of stronger and
20 more even physical texture than that which was then being produced by defendant and that defendant was therefore desirous of discontinuing a part of its existing plant for the production of charcoal. In and by the said agreement, defendant agreed among other things to deliver to the Shelby Chemical Company a sufficient quantity of hard wood to operate the proposed chemical distillation plant of the said Shelby Chemical Company and to furnish to it free of charge steam electrical energy and water for the operation of such plant and to pay to the Shelby Chemical Company during the duration of a contract between the Shelby Chemical Company and the United States of America—that is, during the duration of the war then going on—a conversion charge of fifty (50) cents for each cord of wood converted into charcoal. Defendant further agreed in and by said contract to "deed by good and sufficient deed of general warranty, free from all liens and encumbrances, for the consideration of one dollar ($1.00), sufficient ground on which to erect and construct the plant and buildings" of said Shelby Chemical Company, it being recited that inasmuch as the United States Government would be financially interested in the construction of the plant said real estate might be "deeded to and vested in the United States Government during the period of a contract made between the Chemical Company and the United States Government, said contract to extend for the duration of the war." It was further provided that said contract should extend until April 1, 1933, with the right upon the part of the defendant to extend the same for a further period of five years and that on
21 the termination of the contract, the Shelby Chemical Company should reconvey to the defendant all of the lands which were

to be conveyed to the defendant without cost to defendant and free and clear of any encumbrances or liens whatsoever and that the Shelby Chemical Company should at the election of defendant sell to defendant all of the improvements, equipment, and other property placed on the lands by the said Shelby Chemical Company at a price to be determined in the manner set forth in the contract. It was further recited that the Shelby Chemical Company was about to construct said plant under a contract with the United States Government by the terms of which it was to become the owner of the land, buildings, equipment, and improvements if an enabling statute to that effect should be passed by the Congress of the United States and that the provision as to reconveyance of the lands was "subject to the obtaining of the title to said lands by the Chemical Company from the United States Government."

Third. Defendant further shows that the consideration, and the only consideration moving to it for the execution of said agreement on its part, was the agreement on the part of the Shelby Chemical Company, which was necessarily implied by the terms of the contract, that it would deliver charcoal to defendant for the operation of its furnaces at a cost of fifty (50c) cents for each cord of wood converted into charcoal, which would be of a stronger and more even physical texture than that being produced by defendant by reason of which defendant would be able to discontinue, and did as a matter of fact actually discontinue and dismantle a part
22 of its then existing plant for the production of charcoal, and also the option given to defendant to purchase the said plant at the termination of the contract.

Fourth. Defendant further shows that shortly after the execution of said contract between the Shelby Chemical Company and this defendant and on, to-wit, the 23rd day of April, 1918, a contract was made and entered into between the said Shelby Chemical Company and the United States of America, a true copy of which contract, as defendant is informed and believes and therefore states, is hereto annexed as Exhibit "B" and made a part hereof with leave of reference thereto. In and by said contract it was recited that the Shelby Chemical Company had a contract "with the Shelby Iron Company of Shelby County, Alabama, according to the terms of which the Shelby Chemical Company shall receive all the lumber it may require from timberlands owned and leased by the Shelby Iron Company in return for all charcoal derived therefrom," and that the Shelby Chemical Company had offered to undertake the operation of a plant for the production of acetate of lime and methyl alcohol provided the United States of America would assume the expense of erecting said plant; that the Shelby Chemical Company (called in the contract the contractor) would grant and convey or at the option of the Chief Signal Officer of the Army would lease to the United States of America (called in the contract the Government) for the consideration of one dollar, a tract of land at Shelby, Alabama, of adequate size and suitable location for

23 the erection of such plant; that said conveyance should be made subject to and upon the completion of an option by the Attorney General that by such conveyance the Government would derive an absolute title to the said premises in fee simple and that the Government would have the right to expend money for the erection of improvements thereon; that the contractor should proceed at once to erect for the Government, upon said tract of land, such chemical plant which was to be paid for by the Government at cost to the contractor; that the Government would accord to the contractor the use and occupancy of the plant and equipment for the manufacture of said materials; that the entire output of said plant of lime and alcohol would be sold to the Government for the period not exceeding approximately eighteen months from the date of the contract and thereafter for the duration of the war; that on the repayment to the Government of the cost of the plant, the Government would sell to the contractor such plant, machinery, and equipment at their then fair market value, it being further provided that the option of the Government to make such sale was conditioned upon its having the legal authority to sell and convey. The said contract further provided that in case the Government should take over said plant or undertake to operate it, the Government's right to operate the same should, except as might be expressly provided by statute, cease and terminate at the end of the then existing war and that if at that time the sale of the plant to the contractor should have been consummated, the Government would surrender possession to the contractor but that if at the termination of the war the
24 plant was still owned by the Government, it should at its own expense within six months from the end of the war remove all buildings and equipment constituting such plant from the ground upon which the same was erected and should without further consideration reconvey such land to the contractor. A testative draft of the said contract between the plaintiff and the Shelby Chemical Company was submitted to defendant before the execution of the said contract between defendant and the Shelby Chemical Company and defendant was substantially the same as that which is set out as Exhibit "B." At the instance and insistence of defendant there was embodied in the said testative draft the stipulation hereinbefore mentioned requiring plaintiff to remove all buildings and equipment constituting such plant within six months from the end of the war and to reconvey such land to the contractor if at the termination of the war the plant was still owned by the Government.

Fifth. Defendant further shows that the construction of said plant was begun by the Shelby Chemical Company but before the completion of the same the said war, which was between the United States of America and the Governments of Germany and Austria, terminated on, to-wit, the 11th day of November, 1918, but said plant was finally completed by the Shelby Chemical Company during the year 1919 and the operation of said plant was thereupon begun by the Shelby Chemical Company and the charcoal produced

by said plant was delivered to defendant for the operation of its furnaces continuously thereafter until about the 31st day of March, 1922, when the Shelby Chemical Company ceased to operate
25 said plant and has made no delivery of charcoal therefrom to defendant since that time, the said plant having ever since remained idle and defendant having been subjected to great loss and inconvenience by reason of its failure to receive such charcoal. Defendant further shows that by reason of the fact that it had discontinued, dismantled, and removed a part of its former plant for the production of charcoal, as contemplated in its said contract with the Shelby Chemical Company, and because of the failure of the Shelby Chemical Company to manufacture and deliver to defendant charcoal for the production of iron, defendant has been unable to operate its furnaces at their full capacity and has thereby been subjected to great loss and damage, which would have been avoided if the said contract had been complied with on its part by the said Shelby Chemical Company.

Sixth. Defendant further shows that on, to-wit, the 10th day of April, 1919, the Shelby Chemical Company made and executed a deed to the plaintiff reciting a consideration of one dollar and other good and valuable considerations, which deed purported to convey the real estate on which said plant had been constructed, a copy of said deed being hereto annexed and marked Exhibit "C," and made a part hereof with leave of reference thereto. Defendant shows that at the time of the execution of said deed, the Shelby Chemical Company did not have the legal title to said real estate, which was then and still is in this defendant, although three several deeds had been made on, to-wit, the 11th day of June, 1918, the 17th day of
26 June, 1918, and the 7th day of October, 1918, respectively, which purported to convey said real estate to said Shelby Chemical Company—the two first named deeds being made by the Shelby Iron Company, a corporation organized under the laws of the State of Alabama, and the last mentioned deed conveying nineteen one-hundredths of an acre, being executed merely in the name of Shelby Iron Company, it not appearing therefrom whether the grantor was the Shelby Iron Company of Alabama or the Shelby Iron Company of New Jersey. A true and correct copy of each of said deeds is hereto annexed marked respectively Exhibits "D," "E," and "F." The property described in said last-mentioned deed as being nineteen one-hundredths of an acre was not included in the said deed of the Shelby Chemical Company to the plaintiff, of date April 10th, 1919.

Sixth. Defendant further shows that although the enabling statute referred to in the said contract between defendant and the Shelby Chemical Company was passed, and although it was expressly provided by the terms of said contract that the title to said real estate should be conveyed to the plaintiff for the duration of the war, and although it was expressly provided in the contract between the plaintiff and the Shelby Chemical Company that if at the end of the

war said plant was still owned by the plaintiff, the plaintiff should at its own expense within six months from the end of said war remove all buildings and equipment constituting such plant from the ground upon which the same was erected and should without further consideration reconvey such ground to the Shelby Chemi-
27 cal Company, plaintiff did not remove said buildings and equipment constituting such plant from the ground upon which the same were erected as was contemplated by said contract and as this defendant had expected and had a right to expect that it would do, the said plant being still owned by the Government at the termination of the war.

Seventh. Defendant further shows that on, to-wit, the 23rd day of December, 1922, the Shelby Chemical Company without the knowledge or consent of this defendant and to the prejudice of the rights of this defendant surrendered possession of said plant to the plaintiff and the plaintiff is now in possession of said plant without having ever attempted to operate the same or to comply with the terms of the Shelby Chemical Company's agreement with defendant to deliver to it charcoal as aforesaid and on or about the 19th day of January, 1923, the Shelby Chemical Company was adjudicated a bankrupt under the laws of the United States relating to bankruptcy.

Eighth. Defendant further shows that by reason of the premises, the consideration moving to defendant for the execution of said agreement by it with the Shelby Chemical Company has wholly failed, that the Shelby Chemical Company has disabled itself from carrying out the said contract and making delivery of charcoal to this defendant and that the plaintiff has no authority under the law to operate the said plant or to carry out the terms of said contract, and defendant shows that it would be grossly inequitable, unfair, unjust, and oppressive to this defendant for it to be compelled
28 to specifically perform the said contract by conveying said real estate to the plaintiff. Defendant further shows that it has offered to purchase the said plant from the plaintiff at a fair and reasonable valuation, as defendant had a right to do under its contract with the Shelby Chemical Company on the termination of the contract, but that plaintiff has refused to allow defendant to purchase the said plant and has likewise refused to remove said plant from the property of defendant. Defendant further shows that by reason of the location of said plant in immediate proximity to the furnace plant of defendant and by reason of the fact that said chemical plant and said furnace plant are closely intertwined and interlinked in construction, the said chemical plant cannot be operated by any third party without great loss, detriment, inconvenience, hazard, and risk to this defendant; that the said contract between defendant and the Shelby Chemical Company has never been assigned to the plaintiff and that none of its duties and obligations have been assumed by the plaintiff.

Ninth. Defendant further shows that the said deed from the Shelby Chemical Company to the plaintiff is a cloud on the title of this defendant which ought to be removed and that defendant has no adequate remedy at law. Defendant hereby offers to do equity by purchasing said plant from the plaintiff at its fair and reasonable value or by allowing the plaintiff to remove said plant from the premises of defendant within a reasonable time to be fixed by the court and to do and perform whatever else in equity and good conscience it ought to do to entitle it to the relief hereinafter prayed.

29 Premises considered, defendant prays that this its answer may be treated as a counter-claim and that it may be ordered and decreed by the court that the said deed from the Shelby Chemical Company to the plaintiff shall be cancelled as a cloud on the title of defendant; that the possession of the premises on which the said plant is situated shall be delivered up by plaintiff to defendant within such time and on such equitable terms as may be fixed by the court; that the said contract between defendant and the Shelby Chemical Company shall be cancelled and declared of no further force and effect, and may it please this court to grant unto defendant such other and further relief as in equity may be proper.

CABANISS, JOHNSTON, COCKE & CABANISS,
Defendant's Attorneys.

[*Duly sworn to by Morris W. Bush; jurat omitted in printing.*]

30 *Exhibit "A"*

Memorandum of agreement made this 8th day of April, 1918, by and between Shelby Iron Company of Shelby, Alabama, hereinafter known as "The Iron Company," and the Shelby Chemical Company, a corporation of the State of Delaware of Memphis, Tenn., hereinafter designated as "The Chemical Company."

Whereas, the Iron Company runs and operates two blast furnaces at Shelby, Ala., for the manufacture of charcoal pig iron, and owns and controls large acreage of timber lands on which is growing large quantities of cord wood, which it has been cutting and delivering into Shelby for carbonization and manufacture into charcoal by means of kilns and ovens, but with no facilities for the recovery of the by-products of such carbonization, and

31 Whereas, the Chemical Company is organized for the purpose of manufacturing charcoal and other by-products by modern and improved processes of retort distillation, and is desirous of erecting a chemical wood distillation plant consisting of retorts, still house, etc., contiguous to the furnace of the Iron Company at Shelby, Ala., and

Whereas, the manufacture of charcoal by the retort distillation process results in the production of a greater number of bushels of charcoal for each cord of wood burned than by the kiln or oven method now being used by the Iron Company, and also results in the production of charcoal of a stronger and more even physical texture than that now produced by the Iron Company, and the Iron Company is therefore desirous of discontinuing a part of its present plant for the production of charcoal, and

Whereas, the parties hereto are desirous of agreeing upon the terms and conditions for the erection of said chemical distillation plant, the supply of cordwood to such plant and the manufacture and supply to the Iron Company of charcoal therefrom,

Now therefore, for and in consideration of the facts recited in the preambles hereto, and the sum of one dollar ($1.00) by each of the parties hereto paid to the other party, the receipt whereof is hereby acknowledged, the parties hereto agree to and with each other as follows:

First. The Iron Company agrees to deliver to the Chemical Company, free of all costs and charges, daily a sufficient quantity
32 of four foot (4 ft.) hardwood commercial cordwood of a merchantable quality to operate the proposed chemical distillation plant of the Chemical Company of a capacity of one hundred (100) cords per day to its maximum capacity.

In the event of future increases in the cost of labor or raw materials, or future decreases in the selling prices of finished product, or either or both of these conditions operating so as to render it unprofitable for either of the companies to operate its plant, it is agreed that the parties hereto will in a fair minded way endeavor to agree upon the payment by the Chemical Company of a portion of the cost to the Iron Company of producing and delivering cordwood, if such changes in conditions should operate to the disadvantage of the Iron Company; or, upon an increase of the conversion charge to be paid by the Iron Company, if such changes in conditions should operate to the disadvantage of the Chemical Company.

If the parties hereto shall be unable to agree upon such readjustment of charges, the Iron Company shall have the right to notify the Chemical Company of its election not to furnish cordwood, upon three months' notice in writing, and shall thereupon cease to be under any obligation to furnish cordwood until such time as the Iron Company shall determine that it is possible for it to operate its plant profitably, and thereupon, upon three months' written notice to the Chemical Company, or in less time if such notice is waived by the Chemical Company, *or in less time if such notice is waived by the Chemical Company*, the Iron Company shall re-
sume its obligation to deliver wood to the Chemical Com-
33 pany; and said suspensions of obligation to deliver wood shall take effect when and as often as the Iron Company shall determine that it is unable to operate its plant profitably.

During all of said periods of suspension the Chemical Company shall have the right to purchase wood or the right to cut wood from other lands, and shall also have the right to cut wood from lands of the Iron Company for use at said Chemical Plant only without compensating the Iron Company therefor.

During all of such periods of suspension, and during any periods of shut-down for any cause whatsoever, the Iron Company shall be obligated to take from the Chemical Company only so much charcoal as the Iron Company can conveniently store with its existing facilities for storage of charcoal and such extensions thereof or additions thereto as the Iron Company may from time to time elect to make, and when the limit of storage capacity of the Iron Company has been reached, the Chemical Company shall have the right to dispose of all other charcoal made by it during all periods of suspension or shut-down without accounting to the Iron Company for the sale of such charcoal.

Second. The Iron Company will deliver this dry cordwood in cars to the wood loading track of the Chemical Company. Should the cordwood be brought in green or in larger quantities than the daily capacity or requirements of the Chemical Company's plant, the wood is to be delivered and piled in a storage wood yard to be supplied and tracked by the Iron Company. It is mutually
34 agreed that this storage wood yard of the Iron Company shall be dry ground so that wood can be seasoned without deterioration. The wood yard shall be supplied at the Iron Company's cost with tracks properly placed so that in no instance will it be necessary to go further back from said tracks than three ranks of cordwood allowing 3-foot air space between piles at all times. All tracks supplied by the Iron Company must be so constructed as not to cause undue deterioration of the iron buggies of the Chemical Company.

The Iron Company shall build tracks from said storage wood yard of the Iron Company to the converging point of the tracks on the charging ends of the retorts of the Chemical Company, of it the system of converging tracks is not used, then to the transfer tables on the charging end of the retorts. The Iron Company shall also construct tracks from its furnace to the wood yard for the return of the empty buggies used on conveying charcoal from the distillation plant to the furnaces and shall also construct tracks from the transfer table on the drawing end of the retorts to the furnace trestle where the charcoal is unloaded.

The Chemical Company shall construct all tracks on the charging end of the retorts and all tracks on the drawing end of the retorts up to and including transfer tables; also wood loading tracks which will parallel the tracks of the Iron Company running from the ore bins to the wood yard, this loading track to be used for loading buggies from cars.

35 Third. The Iron Company further agrees to deed by good and sufficient deed of general warranty, free from all liens and encumbrances, for the consideration of one dollar ($1.00) sufficient ground on which to erect and construct the plant and buildings of the Chemical Company together with the tracks of the Chemical Company. Inasmuch as the United States Government will be financially interested in the construction of the Chemical Company's plant, it is expressly agreed that said real estate may be deeded to and vested in the United States Government during the period of a contract made between the Chemical Company and the United States Government, said contract to extend for the duration of the war.

Fourth. The Iron Company agrees to furnish the Chemical Company free of charge approximately 200 HP steam at 100 lbs. pressure or better. This steam will be taken care of by the Chemical Company running its steam line to the header of the Iron Company and the Iron Company shall be paid for all fuel used in the production of said steam outside of furnace gas.

The Iron Company shall also supply the Chemical Company free of charge with whatever electric energy the Chemical Company may require, which is estimated to be from 50 KW to 75 KW. Electricity will be taken from the Iron Company's plant by wire supplied by the Chemical Company which will attach this wire to the Iron Company's switchboard, and the Iron Company shall be paid for all fuel used in the production of said electricity ouside of furnace gas.

36 The Iron Company shall also supply the Chemical Company free of charge with exhaust steam required by the Chemical Company, it being understood that the amount of such exhaust steam shall be no greater than the surplus exhaust steam of the Iron Company.

The Iron Company shall supply the Chemical Company free of charge with from 700 to 1,000 gallons of spring water per minute at the lowest temperature obtainable.

Fifth. In addition to the supply of wood and facilities as hereinbefore recited, the Iron Company agrees to pay to the Chemical Company, during the duration of the contract between the Chemical Company and the United States Government, i. e. during the duration of the war, a conversion charge of fifty (50) cents for each cord of wood converted or manufactured by the Chemical Company into charcoal, said cordage to be measured and computed upon the basis of the wood cordage of the buggies charged, and said conversion charge shall apply to all brands or imperfectly charged wood which shall be required to be again put through the retort plant.

Sixth. In the operation of said charcoal plant, considerable quantities of raw material, such as bags, lime, fuel and miscellaneous supplies are required, and acetate of lime, wood, alcohol, wood tar and other by-products will be shipped out in carload lots. As to these

materials and supplies, the Iron Company agrees to do the switching required with its locomotive either from or to the receiving houses of the Chemical Company, the cost of such switching to be borne by mutually satisfactory arrangement, which can be changed at a later date by the Chemical Company purchasing its own locomotive, and in such an event the Chemical Company shall have running rights over the tracks of the Iron Company for the purpose of doing its own switching.

37

Seventh. It is understood and agreed that the Chemical Company shall have the right at any time within two years from the date hereof to require the Iron Company to erect not to exceed thirty-six (36) workmen's houses at a cost of not to exceed an average of one thousand dollars ($1,000.00) per house, and should the Chemical Company require the Iron Company to erect any houses, the Iron Company, within a reasonable time, shall erect the same and the Chemical Company shall pay for the same the cost thereof plus interest at the rate of 6% per annum in four equal installments maturing six, twelve, eighteen, and twenty-four months from the date of the completion of each shall convey the land upon which said houses stand to the Chemical Company.

The Iron Company reserves the right to decline to approve any sites selected by the Chemical Company, and thereupon the Chemical Company shall select new sites subject to the approval of the Iron Company.

Eighth. This contract shall extend until April 1st, 1933, with the right upon the part of the Iron Company to extend the same for a further period of five years upon notice in writing to the Chemical Company at any time on or before Oct. 1, 1932.

38

Upon the termination of this contract on April 1, 1933, or at the end of the five year renewal period herein provided, the Chemical Company shall reconvey to the Iron Company all of the lands herein provided to be conveyed to it by the Iron Company, without cost to the Iron Company, free and clear of any encumbrances or liens whatsoever, or if there is any mortgage or there are any mortgages on the same not yet due, the Chemical Company shall pay over to the Iron Company the amount thereof or the amount of any bonds outstanding thereunder, with any accrued interest thereon, and shall, if the Iron Company so elects and so notifies the Chemical Company by notice in writing, mailed to it at least thirty days prior to the termination of this contract or the five year extension thereof, sell to the Iron Company all the improvements, equipment, and other personal property placed on said lands of said Chemical Company, and the price to be paid by said Iron Company to said Chemical Company shall be determined in the following manner: each of the parties hereto shall choose one arbitrator, who shall appraise said property, and in the event that said two arbitrators can not agree upon the appraised value thereon, they shall choose an umpire, and the decision of one arbitrator and the umpire shall be conclusive and binding on both parties, provided,

however, that should the Iron Company elect not to acquire said properties, the Chemical Company shall have six months time following the termination of this contract or the five-year renewal thereof, as the case may be, in which to remove all of the improvements, buildings, equipment, machinery, and other personal property
39 placed on said lands by the Chemical Company; and said Chemical Company shall be obligated to restore said lands to the condition in which they were at the time of the execution of this contract as nearly as may be practicable.

It is understood that the Chemical Company is about to construct its plant under a contract with the United States Government, by the terms of which the Chemical Company is to become the owner of the land, buildings, equipment and improvements, if an enabling statute to that effect shall be passed by the Congress of the United States. Therefore, it is distinctly agreed that the foregoing provision as to reconveyance of the lands is subject to the obtaining of the title to said lands by the Chemical Company from the United States Government.

At the termination of this contract or the five year renewal period, the Iron Company shall likewise have the option to repurchase the houses which shall have been built by the Iron Company under this contract without cost for the land and upon an appraisement of their value in the manner hereinbefore set forth for the appraisement of the chemical plant, and that during this contract and or the five year renewal period all repairs and improvements upon the houses shall be made at the cost of the Chemical Company, and if the Iron Company shall exercise its option to purchase the Chemical plant, it shall likewise be obligated to purchase the houses upon the basis hereinabove set forth.

Ninth. The operation of this contract shall be subject to
40 fires, strikes, accidents, acts of God and the Public enemy, and all other causes beyond the control of the parties hereto.

Tenth. It is agreed that neither of the parties hereto shall hire or attempt to hire any of the employees of the other company, and that the Chemical Company shall not erect or operate a commissary or mercantile business in connection with its operations, nor shall it make any contracts or arrangements with any person, firm, or corporation for a commissary or mercantile department in connection with its business, it being understood that the Iron Company will handle the commissary or mercantile department in connection with the Chemical Company's plant through its commissary department.

Eleventh. This agreement shall bind and benefit the parties hereto, their successors and assigns.

This agreement is made and executed by virtue of and in pursuance of resolutions of the board of directors of the parties hereto duly passed at meetings of said boards duly called and held.

In witness whereof, Shelby Iron Company has caused this instrument to be executed by its president and its corporate seal to be

hereunto affixed, and the Shelby Chemical Company has caused this instrument to be executed by its president, and its corporate seal to be hereunto affixed, the day and year first above written.

SHELBY IRON COMPANY,
(Signed) M. W. BUSH, *President.*

Attest:

41 (Signed) J. G. HENDRICK,
Secretary.

SHELBY CHEMICAL CO.

Attest: (Signed) W. H. MATTHEWS,
President.

(Signed) M. A. BOISEN,
Secretary.

Exhibit "B"

Contract No. 3548

Order No. 169

SIGNAL CORPS, UNITED STATES ARMY

These articles of agreement, entered into this 23rd day of April, 1918, by and between Shelby Chemical Company, a corporation organized and existing under the laws of the State of Delaware, party of the first part, hereinafter called the "Contractor," and the United States of America, hereinafter called "Government," represented by A. C. Downey, Major Signal Corps, United States Army, hereinafter referred to as the "contracting officer" acting by the authority of the Chief Signal Officer of the United States Army, and under the direction of the Secretary of War, witnesseth:

Whereas, Congress has declared that war exists between the
42 United States of America and the Governments of Germany and Austria constituting a national emergency; and

Whereas, the United States requires large quantities of acetate of lime and methyl alcohol, and is not able with the facilities now at its disposal to furnish said products in sufficient quantities to meet its requirements; and,

Whereas, the contractor has a contract with the Shelby Iron Company of Shelby County, Alabama, according to the terms of which the Shelby Chemical Company shall receive all the lumber it may require from timber lands owned and leased by the Shelby Iron Company in return for all charcoal derived therefrom; and

Whereas, the contractor has offered to undertake the operation of a plant for the production of acetate of lime and methyl alcohol, provided the Government will assume the expense of erecting said plant; and

Whereas, it is estimated that at an a'gregate cost of approximately four hundred thousand ($400,000.00) dollars, a plant can be erected with a production capacity of approximately twenty thousand (20,000) pounds of acetate of lime and approximately one thousand and fifty (1,050) gallons of methyl alcohol per diem, and it is deemed advisable to create this new source of supply; and

Whereas, it is estimated that in view of the prevailing high cost of construction, such plant would cost as aforesaid, approximately four hundred thousand ($400,000.00) dollars, although in nor-
43 mal times it could be erected for a very much smaller sum; and, further, that the cost of erection of such plant, even at normal cost of construction, would be much greater than would be warranted by any demand for the products of said plant, except the demand arising out of the present war, so that after the termination of the war such plant will be worth but a small part of the actual cost of construction;

Now, therefore, under the provisions of section 120 of the act of Congress relating to National Defense, approved June 3, 1916, and pursuant to all other laws of the United States and executive orders of the President of the United States, and the heads of its departments under which requirements for advertising for proposals are dispensed with and contracts in the form hereof duly authorized, the President hereby places the following order with the contractor with the requirement that it comply with the contract hereinafter set forth; and in consideration of the mutual agreements herein contained, the said parties have agreed, and by these presents do agree to and with each other as follows:

ARTICLE I

The contractor will grant and convey, or, at the option of the Chief Signal Officer of the Army, will lease to the United States for the consideration of one ($1.00) dollar a tract of land at Shelby, Alabama, of adequate size and suitable location for the erection of the plant hereinafter described.

44 Said conveyances shall be made subject to and upon the completion of an opinion by the Attorney General of the United States that by said conveyance the Government will derive an absolute title to the said premises in fee simple, free and clear of all encumbrances, and that the United States will have the right to expend money for the erection of improvements thereon.

ARTICLE II

The contractor agrees to proceed forthwith to erect and construct for the Government upon said tract of land, a properly equipped wood chemical plant with an estimated daily capacity of twenty thousand ($20,000) pounds of acetate of lime and one thousand and fifty (1,050) gallons of methyl alcohol, to be erected and

equipped in accordance with specifications to be approved by the contracting officer, or such person as he may designate.

A. The erection of said plant, including installation of all machinery and equipment, is to be completed in not more than five (5) months from the date of this contract, provided it is possible to complete said plant within that time by the exercise of all reasonable haste; if not, then such time to be extended for such additional period as conditions may reasonably justify.

B. The said plant is to be paid for by the Government at cost to the contractor and without profit to it, but the contractor shall have the right to sublet the whole or any part of the construction
45 and equipment of said plant, provided that the terms of such sub-contracts and the qualifications of all sub-contractors shall be subject to the approval of the officer in charge of the finance department of the equipment division of the Signal Corps.

C. All particulars of the agreement for the construction of said plant shall be embodied in a separate contract in the form in general use by the United States Army in construction work, and in addition to the provisions above set forth shall include all the provisions usually contained in said form.

ARTICLE III

In consideration of an amount equal to forty percent (40%) of the price of all sales to the Government of the materials herein contracted for, to be retained by the Government, the Government hereby agrees to accord to the contractor the use and occupancy of said plant and equipment for the manufacture of said materials for and during the term of this contract and subject to all the terms and conditions herein contained. It is understood that the amounts to be retained represent the carrying charges of said properties, including interest on the Government's investment herein, together with a reasonable amount for the depreciation and amortization or absorption of the heavy excess in cost of said plant and equipment over and above the normal market value thereof, and so much of said amounts as shall exceed interest at six per cent (6%)
46 on the Government investment in the plant and carrying charges shall be set aside and with interest at six percent (6%) thereon shall constitute a depreciation and a mortization fund to be dealt with as hereinafter provided.

ARTICLE IV

The contractor agrees to sell and deliver to the Government the entire output of said plant of acetate of lime and methyl alcohol, and the Government agrees to buy and receive the same up to a maximum of four thousand two hundred (4,200) tons of acetate of lime and four hundred and forty thousand (440,000) gallons of methyl alcohol, which amounts shall be delivered during a period

not exceeding approximately eighteen months from the date hereof, and thereafter for the duration of the present war the contractor will sell and deliver said products to the Government in quantities up to the full capacity of the plant as the Government may require; said sales shall be made upon the following terms and conditions, viz:

(a) The standard of quality of said products shall conform to the specifications set forth in Schedule A hereto attached.

(b) The acetate of lime shall be packed in bags which shall be supplied by the contractor to the Government at the actual cost thereof to the contractor; such bags will be subject to the approval of the Government and shall comply with such regulations as may at the time of shipment be prescribed by any State, Municipal
47 or Federal body, including the Interstate Commerce Commission, having jurisdiction in the premises, as well as by railroad and steamship carriers, and shall be of such material as shall reasonably assure the transportation of the acetate of lime undamaged to points of foreign destination.

All alcohol shall be packed for shipment in such manner as good usage may require. Should the contractor request the Government to furnish tank cars for the shipment of alcohol herein contracted for, the Government will use its best efforts to furnish the said tank cars to the contractor or to have the alcohol refiners furnish them as nearly as possible at such times as the contractor requests.

(c) All of said products at the option of the Government shall be subject to inspection and tests at the works of the contractor by an inspector or inspectors of the Government in order to determine their compliance with the specifications and requirements of this agreement and to acceptance upon such inspection, and contractor shall afford to such inspectors all facilities for making such inspection and tests as the inspectors deem necessary for this purpose.

(d) Upon written request from the Government, the contractor agrees to store at the risk and expense of the Government, for a period of not to exceed thirty (30) days, any of the products which are then completely manufactured and ready for delivery.

(e) Until such time as the contractor shall purchase said
48 plant, as hereinafter in Article VI hereof provided, the price for acetate of lime shall be four cents (4) per pound and the price of methyl alcohol fifty (50) cents per gallon f. o. b. cars at Shelby, Alabama, of which amount twenty-five percent (25%) shall be paid in cash and the remainder shall be applied as hereinafter provided.

(f) From and after the purchase of said plant by the contractor, as hereinafter in Article VI provided, on condition that said purchase shall be consummated within eighteen months after the date hereof, the price of acetate of lime shall remain four (4) cents per pound and the price of methyl alcohol fifty (50) cents per gallon, f. o. b. cars at Shelby, Alabama, until the contractor has delivered to the Government two thousand eight hundred (2,800) tons of

acetate of lime and two hundred and eighty-five thousand (285,000) gallons of methyl alcohol, or until two years have elapsed from the date hereof. After the delivery of the said amounts of acetate of lime and methyl alcohol at the aforeaid prices, the price for all acetate of lime thereafter sold to the Government shall be two (2) cents per pound and the price of all methyl alcohol thereafter sold to the Government shall be twenty-five cents (25) per gallon f. o. b. cars at Shelby, Alabama, as long as the Government desires these products, provided that if the actual cost of production including six percent (6%) on the price paid for said plant by the contractor, shall be found to exceed the selling price of the output of said plant at two cents (2) per pound and twenty-five (25) cents per gallon, respectively, there shall be added to said price a sum sufficient to cover such excess.

49 (g) Until the completion of the purchase of said plant by the contractor, as in Article VI as provided, thirty-five per cent (35%) of the purchase price of products sold to the Government shall be retained by the Government as a purchase fund to be applied as hereinafter provided, and shall be credited by the Government with interest at six percent (6%) on a monthly balance.

ARTICLE V

All amounts payable to the contractor in cash shall be paid on or before the 20th day of each month for materials delivered into the custody of the Government's property officer, f. o. b. cars at Shelby, Alabama, during the preceding calendar month and shall be payable only upon the delivery to the proper disbursing officer of the finance department of the equipment division of the Signal Corps, of a certificate by said property officer of the delivery and acceptance of said materials.

ARTICLE VI

On the last day of the month in which the depreciation and amortization fund established as provided in Article III, and the purchase fund established as provided in Article IV, shall together equal the cost to the Government of the said plants, with interest at six percent (6%) on the Government's investment, or at any earlier date at the option of the contractor, the Government shall sell to the contractor and the contractor will purchase the said

50 plant, machinery and equipment, at their then fair market value, due regard being had to the fact that the Government has an option during the war to purchase the entire product of the plant at a reduced price. Such fair market value shall be determined by three appraisers, one to be appointed by the contractor, one by the Chief Signal Officer of the United States Army, and the third by these two.

The decision of a majority of said appraisers shall be final. If the actual depreciation and mortization shown by such appraisal, that

is to say, the difference between the cost and the appraised value of the plants shall be greater than the amount of the depreciation and mortization fund established as in Article III provided, the excess shall be charged by the Government to the contractor as additional compensation for the use of said plant. If the actual depreciation shall be less than the amount of the said depreciation fund, the contractor shall be allowed credit for the difference as a refund or adjustment or rental. The Government shall have the right to apply the amount of the purchase fund to the discharge of any amounts due to it by the contractor under the provisions of this article. If not so applied, the amount of such fund shall upon the completion of the purchase of the plant by the contractor be paid to the contractor.

It is the intent of the parties hereto that all payments for use and occupation of said premises is in excess of carrying charges, including six percent (6%) interest on the Government's investment, shall be applied to the reimbursement of the Government for
51 any loss which it may suffer in the amortization or absorption of the difference between the cost of the plant and its market value at the time of purchase by the contractor. But the Government shall in no event receive more or less than the cost of the plant plus six percent (6%) interest on the Government's investment.

The obligation of the Government to sell said plant as in this article provided, is conditioned upon its having the legal authority to make such sale and conveyance. If the Government shall not have the legal authority to sell and convey said plant to the contractor, after the contractor is entitled to have said plant conveyed to it, as herein provided, then thirty-five percent (35%) of the selling price of the products sold to the Government hereunder and applied to the purchase fund, together with twenty-five percent (25%) of the total rentals paid under this contract, shall be paid in cash by the Government to the contractor, with interest on both at six percent (6%).

ARTICLE VII

In the event of the failure of the contractor to substantially comply with the terms of this contract, it may be terminated by notice in writing to the contractor without prejudice to any claim the Government may have against the contractor, or that the contractor may have against the Government. After receipt of said notice, the contractor shall not order any additional materials except
52 by permission previously obtained from the contracting officer. Upon termination, the contracting officer, with the approval of the Chief Signal Officer of the Army, may, for the duration of the present war, proceed to complete the production of the materials herein contracted for and any additional materials of similar kind out of materials on hand and may employ such agents and em-

ployees, including the contractor, its agents, and employees, as the contracting officer may deem necessary or desirable and may, for the duration of the present war, take possession of the plants and properties of the contractor used in the performance of this contract, securing from the contractor an assignment of all contracts and agreements relating to this contract (which the contractor hereby agrees to assign and upon failure to so assign this agreement shall operate as such assignment), first repaying to the contractor all sums which it shall have paid thereon not previously repaid to it by the Government, and relieving the contractor from further payments thereon and may generally do and perform all acts and things necessary or advisable, for the duration of the present war, in order to obtain the materials which are to be the subject to this contract.

In the event and to the extent that the Government takes over the plant and property of the contractor for the completion of this contract, or for future production, the contractor shall be paid a reasonable rental for the use of the same as may be mutually agreed upon between the contracting officer and the contractor, or if they fail to agree, as may be fixed by the Chief Signal Officer of the
53 United States Army, as a reasonable rental, and the manufacture of the materials by the Government shall then be conducted for the duration of the present war, without cost of any sort to the contractor, the Government, however, reserving any claim which it may have against the contractor.

It is agreed, however, that in case the Government takes over said plant or undertakes to operate it, by reason of the default of the contractor, or for any other reason, the Government's right to operate the same shall, except as may be expressly provided by statute, cease and terminate at the end of the present war. If at that time the sale of said plant to the contractor shall have been consummated, the Government will surrender possession thereof to the contractor, and if said plant is then still owned by the Government, it shall at its own expense, within six months from the end of said war, remove all buildings and equipment constituting such plant, from the ground upon which the same are erected, and shall without further consideration reconvey such ground to the contractor.

ARTICLE VIII

In the event of the destruction of the said plant in whole or in part prior to the purchase thereof by the contractor as a result of fire, flood, tornado, explosion or other cause not due to the negligence of the contractor, the Government shall have the option to restore said plant or to call upon the contractor to do so, at the cost of the Government, on the same terms and conditions as
54 those herein set forth for the erection of said plant in the first instance, in which case, however, the contractor will be credited as payments on the purchase of the new plant with all sums

theretofore paid as rent and set aside as a purchase fund on account of the plant destroyed.

ARTICLE IX

Neither this contract nor any interest therein shall be transferred or assigned by the contractor to any person, firm or corporation except as herein expressly provided.

ARTICLE X

No Member of or Delegate to Congress, or resident commissioner is or shall be admitted to any share or part in this contract, or to any benefit that may arise therefrom. But this article shall not apply to this contract so far as it may be within the operation or exceptions of section 116 of act of Congress approved March 6, 1909 (35 Stats. 1109).

ARTICLE XI

No person or persons shall be employed in the performance of this contract who are undergoing sentence of imprisonment at hard labor, which has been imposed by the courts of several States, Territories, or municipalities having criminal jurisdiction.

ARTICLE XII

55 Notice under this contract shall be deemed to have been sufficiently given to and received by the contractor when mailed in a sealed, postpaid wrapper and addressed to the contractor. Whenever notice shall be given to the contracting officer, same shall be sufficient when mailed in a sealed, postpaid wrapper, addressed to the Chief Signal Officer of the United States Army, Washington, D. C., or when personally served on the contracting officer or his representatives.

ARTICLE XIII

If chemical tests made by the Government of the products herein contracted for shall disagree with the preliminary tests provided for in Schedule "A" attached to this contract, the contractor shall have the right to refer the question to the Bureau of Standards of the Department of Commerce, Washington, D. C., and the decision of the said bureau shall be final and binding upon both parties and adjustment of the account shall be made upon the basis of such decision.

ARTICLE XIV

Delivery of acetate of lime and methyl alcohol shall be made by the contractor as fast as the materials are manufactured, subject,

however, to the right of the Government to require storage of the product for thirty days (30) or less as provided in paragraph (d) of the Article IV of this contract.

56 ARTICLE XV

Should the Government require greater storage capacity than that provided for in paragraph (d) of Article IV of this contract, such additional storage capacity shall be provided at the cost and expense of the Government, and such cost and expense shall become a part of the cost of the plant as herein provided.

ARTICLE XVI

Whenever the term "contracting officer" is used in this contract, the same shall be construed to mean the contracting officer executing this contract, his successor or successors, his duly authorized agent or agents, or any designated by the Chief Signal Officer from time to time to act as contracting officer hereunder.

ARTICLE XVII

In the event of the cessation of hostilities on the part of the Government or the signature of the Government of a general armistice bringing hostilities on the part of the Government to a close, the Government, at its option, on or after September 1, 1918, but not before, may terminate this agreement, but in such event the contractor shall be entitled to receive from the Government the unpaid purchase price of any acetate of lime or methyl alcohol then actually manufactured and accepted or ready for acceptance hereunder and conforming to the requirements of this agreement;
57 and the contractor shall further be entitled to receive from the Government a sum sufficient to protect the contractor against his actual net expenditures and actual net outstanding obligations made and incurred for labor, equipment, or materials with respect to the plant or acetate of lime and methyl alcohol covered by this agreement but not as yet manufactured and accepted or ready for acceptance at the time of such termination. In the event of such termination of this agreement, the contractor shall do everything in its power, with the approval of the contracting officer, to reduce the amount of the Government's said obligation, and for the purpose of determining the amount of the contractor's net outstanding obligation and liabilities agrees to credit the Government with the fair value of any materials, acetate of lime, or methyl alcohol in process of manufacture.

In the event of the termination of this contract under the provisions of this article, the value of the plant, machinery, and equipment shall be determined by an appraisal by a board appointed as provided in Article V hereof. The decision of a majority of this

board shall be final. The Government will thereupon sell and the contractor will purchase the said plant, machinery, and equipment at such appraised value. In making settlement thereof the contractor shall be given credit on account of the purchase price for the thirty-five percent (35%) of the purchase price of the products theretofore sold to the Government under the provisions of subdivision G of Article IV hereof.

58 ARTICLE XVIII

The contractor shall provide such watchmen and devices for protection of its plant and property and the work in progress for the War Department against espionage, acts of war, and enemy aliens as may be required by the Secretary of War.

The contractor shall, when required, report to the Secretary of War, the citizenship, country or birth of aliens, status of any and all of its employees. When required by the Secretary of War it shall refuse to employ, or, if already employed, forthwith discharge from employment and exclude from its work, any person or persons designated by the Secretary of War for cause as undesirable for employment on work for the War Department.

In witness whereof the party of the first part has caused this contract to be executed by its proper officer thereunto duly authorized, and the United States of America has caused this contract to be executed by the undersigned contracting officer hereto duly authorized.

Witnesseth:

SHELBY CHEMICAL CO.
By W. H. MATTHEWS,
President.

M. A. DOISEN,
Secretary.

59 Witnesses as to Major Downey,
F. D. SCHNACKE.

UNITED STATES OF AMERICA,
By A. C. DOWNEY,
Major Signal Corps, U. S. A.

Approved Apr. 25, 1918.
By authority of the Chief Signal Officer.
Authorization of July 11, 1917.
H. S. Brown, Major Signal Corps.

SCHEDULE "A"

The materials to be supplied are:

Crude methyl alcohol 82 degrees by Tralle's hydrometer at 60 degrees Fahrenheit.

80% fray acetate of lime (calcium acetate).

The materials shall be tested by the contractor at its plant at Shelby, Alabama, and payments shall be made on account on the basis of such tests, with allowance for excess or decrease in proportion as the test of the materials supplied shows increase or decrease from the standards of 82 degrees for methyl alcohol and 80% for acetate of lime.

Exhibit "C"

State of Alabama, Jefferson County:

Know all men by these presents: That for and in considera-
60 tion of one dollar ($1.00) to the Shelby Chemical Company, a corporation, organized under the laws of the State of Delaware, hereinafter referred to as the grantor, in hand paid by the United States of America, hereinafter referred to as the grantee, the receipt of which is hereby acknowledged, and for other good and valuable considerations to the grantor in hand paid by the grantee, the receipt of which is hereby acknowledged, the grantor does hereby grant, bargain, sell and convey to the grantee, the real estate situated in Shelby County, Alabama, described as follows: Retort building site—Beginning at an iron stake in the northwest quarter of the southeast quarter of section 13, township 22 south, range 1 west, Shelby County, Alabama, said point being sixteen hundred and fifty-five (1655′) feet west of the Huntsville meridian and fourteen hundred and twenty-seven (1427) feet north of the south line of section 13, township 22 south, range 1 west, and running thence south sixty-four degrees nineteen minutes east 550′, thence north 25 degrees 41′ east seven hundred and ten (710) feet; thence north 64 degrees 19′ west 550 feet, thence south 25 degrees 41′ west seven hundred and ten (710) feet to the beginning, containing 8.96 acres.

Still house site—Beginning at an iron stake in the northwest quarter of the southeast quarter of section 13, township 22, south, range 1 west, Shelby County, Alabama, said point being two thousand and forty-eight (2048) feet west of the Huntsville meridian, and thirteen hundred and forty-two (1342) feet north of the south line of section 13, township 22, south, range 1 west, and
61 running thence south 43 degrees 46′ east two hundred and four and four-tenths (204.4) feet, thence south one degree 41′ west two hundred seventy-one and two-tenths (271.2) feet, thence south 69 degrees 54′ west one hundred and seventy-five and seven-tenths (175.7) feet, thence north 66 degrees 52′ west two hundred and twenty-three and two-one hundredths (223.02) feet, thence north 31 degrees 11′ east four hundred and fifty-eight (458) feet to the beginning, containing two and one-half (2.50) acres.

Strip connecting retort site with still house site—Beginning at a point in the south line of the retort building site, heretofore described, said point being one hundred and fifty-eight (158) feet southeast of the southwest corner of the said tract and running

thence with the south line of the retort building site south 64 degrees 19′ east fifteen and one-half (15.5) feet, thence south 68 degrees 40′ west four hundred and fifty-five (455) feet to the north line of still house site, heretofore described, said point being thirty-three (33) feet northwest of the northeast corner of said tract and running thence north 43 degrees 46′ west with north line of still house tract twelve and one-half (12.5) feet, thence north 68 degrees 40′ east, four hundred and forty-nine (449) feet to the beginning, containing one-eighth (1/8) of an acre.

Also the following parcel of land, beginning at an iron stake marking the northwest corner of the eighth and 96.100 acre retort building site, same being in the northeast quarter of southeast quarter of section 13, township 22 south of range 1 west,
62 Shelby County, Alabama, and running thence with the north line of the retort building site south 64 degrees 19′ east two hundred and fifty (250) feet; thence north 42 degrees 11′ east seven hundred feet, thence north 77 degrees 49′ west one hundred feet; thence south 62 degrees 41′ west three hundred feet; thence south 48 degrees 25′ west four hundred and forty-two and 6/10 feet to the beginning, containing in all three and seven-tenths acres.

To have and to hold, unto the grantee and its assigns forever.

And the grantor does for itself its successors and assigns, covenant with the grantee, its successors and assigns that the grantor is lawfully seized in fee simple of the said premises; that they are free from all incumbrances; that the grantee has a good and lawful right to sell and convey said premises as aforesaid; that the grantor and its successors and assigns with forever warrant and defent the title to said premises unto the grantee and its successors and assigns against the lawful claims of all persons.

In witness whereof, the said Shelby Chemical Company has caused its name and corporate seal to be hereto affixed by its president and the execution hereof to be attested by its secretary, who are thereunto duly authorized, on the tenth day of April, 1919.

(Signed) SHELBY CHEMICAL CO.,
By W. H. MATTHEWS,
President.

Attest:
M. A. BOISEN, *Secy.*
[SEAL.]

63 State of Alabama, County of Jefferson:

I, K. B. Macey, a notary public in and for said county, in said State, hereby certify that W. H. Matthews, whose name as president of the Shelby Chemical Co., a corporation, is signed to the foregoing conveyance, and who is known to me, acknowledged before me, on this day, that, being informed of the contents of the conveyance, he, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and seal of office this the tenth day of April, 9.

(Signed) K. B. MACEY,
Notary Public.

SEAL.]

te of Alabama, Shelby County:
hereby certify that the within deed was filed in this office for ord 11th day of April, 1919, at two o'clock p. m., and recorded in d record 65, pages 127 130, and examined

(Signed) G. W. WEAVER,
Judge of Probate.

Exhibit "D"

te of Alabama, County of Jefferson:
Know all men by these presents, that for and in consideration of dollar ($1.00) to the Shelby Iron Company, a corporation organ- l under the laws of the State of Alabama, hereinafter referred as the grantors, in hand paid by the Shelby Chemical Company, orporation, organized under the laws of the State of Delaware, einafter referred to as the grantee, the receipt of which is hereby nowledged and for other good and valuable considerations of the ntor in hand paid by the grantee, the receipt of which is hereby nowledged, the grantor does hereby grant, bargain, sell, and con- to the grantee the real estate situated in Shelby County, Ala- na, described as follows: Retort building site, beginning at an n stake in the NW. ¼ of the SE. ¼, Sec. 13, Tp. 22 south, range est, Shelby County, Alabama, said point being sixteen hundred l fifty-five (1,655) feet west of the Huntsville meridian and four- n hundred and twenty-seven (1,427) feet north of the south line section 13, township 22 south, range 1 west, and running thence th sixty-four degrees, 19′ east, five hundred and fifty (550) feet, nce north twenty-five degrees, 41′ east, seven hundred and ten 0); thence north sixty-four degrees, 19′ west, five hundred and y (550) feet; thence south twenty-five degrees, 41′ west, seven ndred and ten (710) feet to the beginning, containing 8.96 acres.

Still house site, beginning at an iron stake in the NW. ¼ of SE. ¼ of section 13, township 22 south, range 1 west, Shelby unty, Alabama, said point being two thousand and forty-eight 048) feet west of the Huntsville meridian and thirteen hundred l forty-two (1,342) feet north of the south line of section 13, wnship 22 south, range 1 west, and running thence south forty- ee degrees, 46′ east two hundred and four and 4/10 (204.4) feet, nce south one degree, 41′ west two hundred and seventy-one and 0 (271.2) feet, thence south sixty-nine degrees 54′ west, one ndred and seventy-five and 7/10 (175.7) feet, thence north sixty-

six degrees, 52′ west, two hundred and twenty-three and 2/10 (223.2) feet, thence north thirty-one degrees, 11′ east four hundred and fifty-eighth (458) feet to the beginning, containing two and one-half (2.50) acres, strip connecting retort site with still house site, beginning at a point in the south line of retort building site heretofore described, said point being one hundred and fifty-eight (158) feet southeast of the southwest corner of said tract and running thence with the south line of retort building site south sixty-four degrees, 19′ east fifteen and one-half (15.5) feet, thence south sixty-eight degrees, 40′ west four hundred and fifty-five (455) feet to the north line of the still house site, heretofore described, said point being thirty-three (33) feet northwest of the northeast corner of said tract and running thence north forty-three degrees, 46′ west with north line of still house tract twelve and one-half (12.5) feet, thence north sixty-eight degrees, 40′ east four hundred and forty-nine (449) feet to the beginning, containing one-
66 eighth of an acre. To have and to hold, unto the grantee and its assigns forever and the grantor does for itself, its successors and assigns, covenant with the grantee and its successors and assigns, that the grantor is lawfully seized in fee simple of the said premises; that they are free from all encumbrances; that the grantee has a good and lawful right to sell and convey the said premises as aforesaid; and that the grantor and its successors and assigns will forever warrant and defend the title of said premises unto the grantee and its successors and assigns against the lawful claims of all persons. In witness whereof, said Shelby Iron Company has caused its name and corporate seal to be hereto affixed by its president and that the execution hereof attested by its secretary, who are thereunto duly authorized, on the 11th day of June, 1918.

SHELBY IRON COMPANY,
By W. M. BUSH,
President.

Attest:
B. Y. FROST, *Secretary.*
[SEAL.]

State of Alabama, County of Jefferson:

I, R. Moore, a notary public, in and for said county, in said State, hereby certify that Morris W. Bush, whose name as president of Shelby Iron Company, a corporation, is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that being informed of the contents of the conveyance,
67 he as such officer and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and seal of office this the 11th day of June, 1918.

[SEAL.]

R. MOORE,
Notary Public.

State of Alabama, County of Shelby:

I hereby certify that the within deed was filed in this office for record 27th day of August, 1918, 11 o'clock A. M., and recorded in Deed Record 64, page 310, and examined.

G. W. WEAVER,
Judge of Probate.

CERTIFICATE

State of Alabama, County of Shelby:

I, L. B. Riddle, judge of probate in and for said State and county, hereby certify that the above and foregoing is a true and correct copy of the original deed of Shelby Iron Company to Shelby Chemical Company as the same appears on record in the probate office of Shelby County, Alabama, recorded in Deed Record 64, page 310, et seq.

Witness my hand this February 26th, 1923.

L. B. RIDDLE,
Judge of Probate.

68 *Exhibit "E"*

State of Alabama, Jefferson County:

Know all men by these presents, that for and in consideration of one dollar to the Shelby Iron Company, a corporation organized under the laws of the State of Alabama, hereinafter referred to as the grantor, in hand paid by the Shelby Chemical Company, a corporation organized under the laws of the State of Delaware, hereinafter referred to as the grantee, the receipt of which is hereby acknowledged, the grantor does hereby grant, bargain, sell, and convey to the grantee the real estate situated in Shelby County, Alabama, described as follows: Beginning at an iron stake marking the northwest corner of the eight and 96/100 acre retort bldg. site, same being in the northeast quarter of the southeast quarter of section 13, township 22, south, range 1, west, Shelby County, Alabama, and running thence with the north line of the retort bldgs. site south sixty-four degrees 19′ east two hundred and fifty feet; thence north forty-two degrees 11′ east seven hundred feet; thence north seventy-seven degrees, 49′ west one hundred feet, thence south sixty-two degrees forty-one minutes west three hundred feet; thence south 48 degrees 25′ west four hundred and forty-two and 6/10 feet to the beginning, containing in all three and seven-tenths acres.

69 To have and to hold under the grantee and its assigns forever. And the grantor does for itself, its successors and assigns covenant with the grantee and its successors and assigns, that the grantors is lawfully seized in fee simple of the said premises that they are free from all encumbrances, that the grantor has a good and lawful right to sell and convey said premises as aforesaid;

that the grantor and its successors and assigns will forever warrant and defend the title to said premises unto the grantee and its successors and assigns against the lawful claims of all persons.

In witness whereof, the said Shelby Iron Company has caused its name and corporate seal to be hereto affixed by its president, and the execution hereof to attested by its secretary, who are thereunto duly authorized, on the 17th day of June, 1918.

SHELBY IRON COMPANY,
By M. W. BUSH,
President.

Attest:
B. Y. FROST, *Secretary.*

State of Alabama, Jefferson County:

I, R. Moore, a notary public in and for County of Jefferson, said county and State, hereby certify that Morris W. Bush, whose name as president of the Shelby Iron Company, a corporation, is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents
70 of the conveyance, he, as such officer and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and seal of office this 17th day of June, 1918.

[SEAL.] R. MOORE.
Notary Public.

State of Alabama, Shelby County:

I hereby certify that the within deed was filed in this office for record 4th day of October, 1918, at 10 o'clock A. M. and recorded in Deed Record 64, page 359, and examined.

G. W. WEAVER,
Judge of Probate.

Exhibit "F"

State of Alabama, Jefferson County:

Know all men by these presents, that for and in consideration of five ($5.00) dollars, to the undersigned grantor the Shelby Iron Company, a body corporate, in hand paid by Shelby Chemical Company, a corporation, the receipt whereof is hereby acknowledged the said Shelby Iron Company does by these presents,
71 grant, bargain, sell, and convey unto the said Shelby Chemical Company the following described real estate, to wit: A certain parcel of land in the southwest quarter of southeast quarter, SW. ¼ of SE. ¼, section 13, township 22, range 1 west, in Shelby County, Alabama, which said parcel adjoins the southwest portion of the two and one-half acre still house site and if more particular described as follows: Beginning at an iron stake marking the southwest corner of the still house two and one-half acres and running thence north

75° 35′ west one hundred and thirty-six and 1/10 (136.1) feet to an iron stake; thence south 75° 35′ east three hundred and fifty-six and 8/10 (356.8) feet to the south corner of the still house site; thence with the southwest line of the still house, north 66° 52′ west two hundred and twenty-three and 2/10 (223.2) feet to the beginning, containing in all 19/100 acres.

To have and to hold to the said Shelby Chemical Company, its successors and assigns forever. And Shelby Iron Company does for itself, its successors and assigns covenant with said Shelby Chemical Company, its successors and assigns that it is lawfully seized in fee simple of said premises; that they are free from all encumbrances and that it has a good right to sell and convey the same as aforesaid; that it will and its successors and assigns shall warrant and defend the same to the said Shelby Chemical Company, its successors forever againt the lawful claims of all persons.

In witness whereof the said Shelby Iron Company, by its
72 president, M. W. Bush, who is authorized to execute this conveyance, has hereunto set its signature and seal this 7th day of October, 1918.

SHELBY IRON COMPANY, [L. S.]
By M. W. BUSH, [L. S.]
President.

Witness:
B. Y. FROST, *Secy.*

[SEAL.]

State of Alabama, Jefferson County:

I, R. Moore, a notary public in and for said county and State, hereby certify that M. W. Bush, whose name as president of the Shelby Iron Company, a corporation, is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that being informed of the contents of the conveyance he as such officer and with full authority executed the same voluntarily for and as the act of said corporation.

Given under my hand this 7th day of October, 1918.

[SEAL.]

R. MOORE,
Notary Public.

I hereby certify that the within deed was received in this office for record Oct. 28th, 1920, and recorded in Deed Record Vol. 70, page 16, Oct. 28th, 1920, and examined.

G. W. WEAVER,
Judge of Probate.

73 CERTIFICATE

State of Alabama, Shelby County:

I, L. B. Riddle, judge of probate in and for said State and county, hereby certify that the above and foregoing is a true and correct copy of the original deed of Shelby Iron Company to Shelby Chemical Company as the same appears on record in the Probate Office of Shelby County, Alabama, recorded in Deed Record 70, page 16.

Witness my hand this January 19, 1923.

(Signed) L. B. RIDDLE,
Judge of Probate.

In United States District Court

[Title omitted.]

Motion to strike portions of answer to amended bill

(Filed Aug. 2, 1923)

74 The United States of America, complainant in this cause, moves the court to strike out paragraphs one, two, three, four, five, six A, six B, seven and eight of the answer filed by Defendant to complainant's original bill as amended, because said paragraphs in no wise set up any legal or equitable defense to complainant's original bill as amended.

(Signed) C. B. KENNAMER,
United States Attorney.
(Signed) A. L. RICHARDSON,
Special Assistant U. S. Attorney.

In United States District Court

[Title omitted.]

(Reply filed Aug. 2, 1923)

The United States of America, complainant in this cause, for answer to the answer filed against the complainant on its original bill in this cause says:

75 1st. That the defendant, the Shelby Iron Company, a corporation of New Jersey, was a party to the deeds herein referred to and that it was the true intent and purpose of said Shelby Iron Company of New Jersey, when said deed was executed, to convey all of the right, title, and interest of said Shelby Iron Company of New Jersey to the property described in complainant's original bill.

2nd. To paragraphs two, three, four, five, six A, six B, seven and eight, the complainant neither admits nor denies the matters and things therein set forth, but does assert that its rights under the

original bill as amended filed in this cause are in no wise effected by any of the matters and things set forth in said paragraphs.

(Signed) A. L. RICHARDSON,
United States Attorney.
(Signed) C. B. KENNAMER,
Special Assistant U. S. Attorney.

76 In United States District Court

Statement of evidence taken orally before the court on the 2nd day of August, 1923

(Filed January 11, 1924)

[Title omitted.]

STIPULATION RE EXHIBITS

It is admitted between the plaintiff and defendant in this cause that the exhibits annexed to the answer of the Shelby Iron Company filed on the 2nd day of August, 1923, are true and correct copies of the originals: that the original of Exhibit "A" of said answer which purports to be a copy of the contract between the Shelby Iron Company and Shelby Chemical Company of date April 8, 1918, was properly executed by the Shelby Iron Company and the Shelby Chemical Company; that the original of Exhibit "B" which purports to be a contract between the Shelby Chemical Company and the United States of America, bearing date, the 23d day of April, 1918, is a true and correct copy of the original
77 and that the original was duly and properly executed: that the original of Exhibit "C" was duly executed by the Shelby Chemical Company and the United States of America; that the orginal of which Exhibits "D" and "E" purport to be copies were executed by the Shelby Iron Company, and that the original of which Exhibit "F" purports to be a copy was executed by the Shelby Iron Company, without any description as to whether it was the Shelby Iron Company of Alabama, or the Shelby Iron Company of New Jersey, and that the conveyance here referred to where the grantor or the contractor described as the Shelby Iron Company of Alabama, or simply as the Shelby Iron Company, it is agreed that the owner of the property was the Shelby Iron Company of New Jersey, and that it was the true intention and purpose of the parties to make such contracts and conveyances on and in behalf of the Shelby Iron Company, a corporation of New Jersey, and it is further admitted that all of the exhibits to said answer are true and correct copies of the originals and that they were all executed as said exhibits show and purport.

Testimony for the defendant

Direct examination

By MORRIS W. BUSH:

My name is Morris W. Bush. I am president of the Shelby Iron Company, a corporation organized under the laws of New Jersey, and also president of the Shelby Iron Company, a corporation
78 organized under the laws of Alabama. There are two corporations of that name. I am the M. W. Bush that executed the contract in behalf of the Shelby Iron Company with the Shelby Chemical Company, which bears date, the 8th day of April, 1918, a copy of which is annexed as Exhibit "A" to the answer of the defendant in this case.

At the time of the execution of this contract, the Shelby Iron Company of New Jersey was engaged in the manufacturing of charcoal iron at Shelby, Alabama, and charcoal was a necessary adjunct in the manufacture of charcoal iron at the time of the execution of this contract. That was the fuel used for smelting ore and is still used for that purpose.

Question. Were there any negotiations between the Shelby Chemical Company and the Shelby Iron Company, whom I will hereafter call the defendant, prior to the execution of this contract about which I have asked you?

Answer. Yes.

Mr. RICHARDSON. I object to that as being irrevelant, incompetent and immaterial.

The COURT. It is not contradicting the contract, but only to show the situation, I guess.

Mr. CABANISS. That is all.

The COURT. I won't consider it as contradicting the contract, of course.

Question. State whether or not it was represented to you
79 by the Shelby Chemical Company at the time of the making of this contract that it was organized for the purpose of manufacturing charcoal and other by-products by modern and improved processes of retort distillation, and that it desired to erect a chemical and wood distillation plant consisting of retorts, still houses, etc., contiguous to the furnace of the defendant?

Mr. RICHARDSON. I object to that on the ground that the contract is the best evidence and that proof as to the representation made by parties not in court is not competent.

The COURT. Overruled.

Answer. Yes, sir. It was represented by the Shelby Chemical Company that the manufacture of charcoal by its retort distillation process would produce practically one-third more than the beehive kiln method we were then using and that it would be stronger and be delivered to us dry. Before the execution of the contract by me for the defendant and the contract between the Shelby Chemi-

cal Company and the United States of America, or the principal points were submitted, and we insisted on others being added. It was at our instance and request that there was inserted in the contract stipulations requiring the plaintiff to remove all buildings and equipment constituting the chemical plant within six months from the end of the war, and to reconvey the land to the contractor, the Shelby Chemical Company, if, at the termination of the war, the plant was still owned by the Government. That was before the
80 execution of the contract between the Chemical Company and the Shelby Iron Company, or the execution of any contract.

After the execution of this contract between the Chemical Company and the defendant, the defendant dismantled and discontinued part of its existing plant and abandoned a great many of its kilns, and cancelled leases on two other plants, and cancelled its arrangements for making pit charcoal. This plant was to make about 50% of our total requirements. After it was put in operation, it actually made 50% and 5/8ths, which was supplied to the defendant. For the time the plant was in operation, every pound of it.

Whereupon the following proceedings were had.

Question. Every pound of it? Did you comply with this contract on your part, meaning by you, "the defendant," with respect to the furnishing of timber or wood for charcoal, and the furnishing of steam or electrical energy and water?

Mr. KENNAMER. We object to that because it calls for conclusion from the witness as to whether he complied with the contract.

Mr. CABANISS. It is a shorthand rendering.

The COURT. I guess you can cross him on it. Just the general proposition to show compliance. I overrule the objection.

Answer. We complied with it in every particular, and to the extent of spending nearly $50,000 to enable us to comply with it, in putting in extra power units, improving our boiler plant, chang-
ing trackage and laying pipe lines, putting in water pumps,
81 transmission lines, and so forth. We furnished the hardwood for the operation of the plant and furnished the plaintiff free of charge steam, electrical energy and water for the operation of the plant as called for by the contract. We did not pay fifty cents per ton. That part of the contract was not carried out, because the charcoal was furnished after the armistice had been declared.

We paid for it at the price agreed upon between us and the Chemical Company. We were furnished with a copy of the contract between the Shelby Chemical Company and the United States before the deeds were made. We were furnished these copies by the Chemical Company. There was no other consideration for this contract between the Shelby Iron Company and the Chemical Company other than the fact that charcoal was to be furnished by the Chemical to the Iron Company; and other than the fact that the Iron Company was to have an option to purchase the plant at the end of the contract.

Whereupon the following proceedings were had.

Question. I believe you said that it was at your instance and insistence that there was embodied in the contract between the Chemical Company and the United States, the stipulation requiring it to remove all buildings and equipment constituting the plant within six months after the termination of the war.

Answer. Yes, sir.

Mr. KENNAMER. We object to that on the ground that it is
82 not shown that the Government or anyone authorized to act for the Government knew of such dealings between the parties.

The COURT. To whom was that insistence made known?

Mr. CABANISS. Yes.

Question. To whom was that insistence made known?

Answer. It was made known to the president of the Shelby Chemical Company, and it was embodied in the contract and afterwards submitted to me before the execution of the deeds.

The construction of the plant was begun in the summer of 1918. It was not quite completed at the end of the war, but it was practically completed, in fact, a great deal of work had been done and all of the materials had been purchased. A great deal of it had been shipped but not erected, a great deal of it had been fabricated to the point where it could not be stopped. It was thereafter completed and operated. It was completed in the latter part of 1919. I think about September or October. The delay in completion was caused by the holding up of the work by the Government for several months. After its completion, charcoal was produced by the plant and delivered to the defendant continuously until the plant ceased to be operated, about the latter part of March, 1922. No deliveries have been made since that date. Since then, the plant has remained idle. Because of the fact that we have not received charcoal since that time, we have had to practically operate our plant half time, resulting in very heavy loss.
83 We have been unable to get charcoal to operate over more than 50%, although we have made every effort to buy in various markets. We would have had ample charcoal to operate full time if the contract had been complied with by the Shelby Chemical Company in furnishing charcoal to the Shelby Iron Company. The plaintiff has not removed the buildings or equipment constituting the plant from the ground upon which it was erected. We knew nothing of the surrender of the possession of the plant by the Shelby Chemical Company to the Government until after it had been surrendered, and we were notified by the management of the Shelby Chemical Company that the Government agents had taken charge of the plant. I think that it was the 22nd or 23rd day of December, 1922. I was notified by the local management of our plant at that time. The plaintiff nor anyone else have ever attempted to operate the plant, or to comply with the terms of the

Shelby Chemical Company agreement with the defendant to deliver to it charcoal, since the Shelby Chemical Company ceased to operate the plant.

It was here agreed between counsel for the plaintiff and counsel for the defendant that the Shelby Chemical Company was adjudicated a bankrupt about the 19th day of January, 1923.

The WITNESS. Acting on behalf of the Shelby Iron Company, I had negotiated for an offer to buy the plant from the Government, but my offer was declined. We were never able to get any explanation or any reason except that the bid was not satisfactory. We asked
84 what bid would be satisfactory but we got no anwer on that. I have a photograph and map showing the location of that plant with reference to the plant of the Shelby Iron Company. It is very difficult to get a photograph on account of intervening buildings. This does not show the connecting link. This the plant map. [Witness pointed out object on map.] This distance here, this is our stock house and blast furnace—our two furnaces, this distance is between 175 and 200 feet. This is a little less than 200 feet. They were located that way so that the charcoal coming over here could be switched a very short distance right into the stock house. This was located here so that we could furnish from our boilers, located right there, steam for operating this plant, and also from our blast engines. Here, exhaust steam, also here we can furnish from the hot blast stoves, hot blasts for drying the acetate of lime. That is the still house [indicating]. That is where the charcoal is made and is where the by-products are made from the crude liquor. Immediately back of this is where the wood is stored in a wood yard with a fan shaped system of tracks. The furnaces are situated between the two tracks. If we had located this back here we would have been too far to carry steam efficiently. It also made our transmission lines much shorter. It is an integral part of this plant; it is absolutely tied up with it. Without it, it cannot be operated except at great inconvenience, loss, and disadvantage to the Shelby Iron Company. It gets operations mixed up absolutely with ours. Labor problems complicated by two concerns in the same lot bidding for labor. The
85 plant has to have steam, and electrical energy, and large quantities of water, about 1,000 gallons a minute of cold water; has to have electrical energy and exhaust steam; live steam and exhaust steam, and waste heat from these stoves for drying the acetate of lime. There are no facilities for supplying these things except through the agency of the Shelby Iron Company and none for switching the plant. They have to use all of our tracks, which would be a great disadvantage if any outside company operated through our yards. It would be an impossible operating proposition. These photographs here show constituent parts. This one [indicating] is the front of the blast furnace plant, and this is the still house [indicating] and marked Exhibit 1 for the record. This is the same view taken from a slightly different position, giving a view of the

retort plant, marked Exhibit B. This is an exhibit showing the wood yard and blast furnace, that is piled all along the system of tracks to go into the retorts, and this looks like a longer distance, but the distance from where the charcoal finally comes out from our stock house is between two and three hundred feet, only. Exhibit "A" and "C" show furnace plant of the defendant, and over to the left is the still house. Exhibit "B" shows the blast furnace plant and the still house, the same view except a slightly different location. Exhibit "C" shows the retorts and wood yard and the blast furnaces. These retorts and wood yards are situated in the rear of the blast furnaces. On March 12, 1923, we made a request or demand on the Government to remove the plant from the premises of the defendant. These plants are closely intertwined and interlinked in construction,
as much so as if it had been one plant. It was so arranged for
86 saving expense to the Government and getting efficiency in
those plants close to the boilers, power plant, and the blast furnaces. A third party can only operate this plant at great expense to themselves and detriment to the Shelby Iron Company; in fact, they would have to just use a joint yard for switching wood and other things. There would be competition for labor in a very small community in a very sparsely settled country, where we have great difficulty in getting enough labor for our operations, and if there was competition and changing of rates it would be very hurtful. It would be necessary for anyone operating that plant to erect a plant for the furnishing of steam and electrical energy and to provide water, and to furnish trackage and housing facilities, and storage places for wood.

CROSS-EXAMINATION

I have been president of the Shelby Iron Company, incorporated under the laws of New Jersey, since 1914. At the time the contract between the Shelby Iron Company and the Shelby Chemical Company was entered into, marked Exhibit "A," the Shelby Iron Company of New Jersey owned the properties here described in the contract executed by the Shelby Iron Company of New Jersey. The Shelby Iron Company of New Jersey had owned the properties since about 1890, or twenty-seven or eight years. The Shelby Iron Company of New Jersey also owned blast furnaces and surrounding
properties located at Shelby. Formerly the Shelby Iron Com-
87 pany of Alabama had owned the properties and had conveyed
them to the Alabama Coal and Iron Company, a New Jersey corporation, which name was immediately changed to the Shelby Iron Company of New Jersey. I was not a member of the corporation. I was not interested in it at that time. I was not employed by it at that time. I was ten years old. I have seen the deeds or copies of the deeds of the Shelby Iron Company of New Jersey of that date. I do not know of my own knowledge what the consideration was. I do not know why the name of the corporation was

changed to that of Shelby Iron Company. The officers of the Shelby Iron Company of New Jersey act as the officers of the Shelby Iron Company of Alabama, and the Shelby Iron Company of New Jersey owns the Shelby Iron Company of Alabama. They own the stock. The *Shelby Iron Company of Alabama has no* assets and does not function in any way, and, I presume, has since it sold its property. Since I have been connected with these companies, the Shelby Iron Company of Alabama has not operated a plant at Shelby, Alabama, or been in possession of that property. In the two deeds which I executed and are exhibits in this case, where it is stated the Shelby Iron Company was organized under the laws of the State of Alabama, I presume it was a mistake of the attorneys drawing up the deeds. I did not draw the deeds, the attorneys do that as a rule. I do not know which one of our attorneys drew that. I tried to find out, but there is no record. I know of no other instances since I have been president of the company of any deeds which have been given,
where the Shelby Iron Company is described as a corporation
88 organized under the laws of Alabama. These are the only two
instances, so far as I know. The Shelby Iron Company of New Jersey usually designated itself as the Shelby Iron Company of New Jersey. It has an office (a technical office) in Jersey City, New Jersey. It has an office here in the American Trust Building and this is the principal office. Shelby Iron Company is the name that appears on the door. I do not know what name apears in the directory. The style of name we use on our letterheads is Shelby Iron Company. We do not ordinarily put on our letterheads Shelby Iron Company, a corporation organized under the laws of New Jersey. At the time I entered into this contract with the Shelby Chemical Company, I was authorized to do so by the board of directors of the Shelby Iron Company, incorporated under the laws of New Jersey, and was authorized by that company through its directors to transfer this property by warranty deed. I did not discover this error in the description of the grantor of those deeds until about three or four months ago. At the time those deeds were given I delivered posession of the property to the Shelby Chemical Company. I did not discover this error myself, but my attention was called to it by one of our men in the office. I did not have copies of those deeds in my office. They were usually kept at the Shelby office.

Whereupon the following proceedings were had.

Question. How did he call your attention to this error?

Mr. CABANISS. I think that is immaterial. I object to it.

89 The COURT. Overruled.

Answer. In getting up the records in this case, the copies of those deeds were sent to me with a memorandum pinned to them simply calling attention to that fact. They were sent to me by our secretary, Mr. J. G. Hendrick. I think he got them from the records of the probate court. As far as I knew, up to that time, I believe we had transferred this property by good and sufficient warranty

deeds. No attention had been called to it by either the attorneys of the Shelby Chemical Company or the Government attorneys. That was the idea under certain conditions in connection with the contract with the Shelby Chemical Company. I executed these two deeds and in executing them for the Shelby Iron Company of New Jersey, I did not detect any difference in it, under the terms and conditions of the contract with the Shelby Chemical Company that is what I attempted and intended to do.

It is here admitted in open court between counsel for the complainant and counsel for the defendant that when the Witness Bush executed the two deeds, it was his true intention to execute same for and on behalf of the Shelby Iron Company of New Jersey.

Whereupon the following proceedings were had.

Mr. RICHARDSON. If your Honor, please——

The COURT. There is a stipulation in the record. How can you better that?

Mr. CABANISS. That is what we intended to do. There is not any question about it.

90 Mr. RICHARDSON. Only this. It has been admitted that it was a mistake. These people come here and claim equities, and we have a right to show whether or not that mistake——

The COURT. You have a right to show whether there was any purpose in it. You had no authority from the Alabama Company to execute the deed anyway, did you?

The WITNESS. No; I did not.

The COURT. So, leaving out the question of the terms and conditions, there is no doubt. I understand they executed the deed for the New Jersey Company.

The WITNESS. Yes.

The COURT. So far as the mere question of who was the grantor is concerned, there was no doubt about that at all.

When the Shelby Chemical Company commenced the operation of their plant and commenced making deliveries of charcoal, we discontinued operation of certain kilns and leases. I think we got the first charcoal in October, 1919. We had not cancelled any of our contracts or leases until we actually received charcoal under this contract. We needed the output until this occurred. We discarded nearly one-half of our kilns at Shelby at the No. 1 plant. We shut down at our Garden City plant. We cancelled a lease on 20 ovens a very large plant at Attalla, Alabama. We cancelled a lease on a plant at Ashby, Alabama. We discontinued our pit contracts

91 which supplied us with almost one-third of our charcoal. We were receiving enough from our facilities with some charcoal that we purchased to operate on. We sometimes operated two furnaces; most of the time only one. We only have facilities for one. Up until the time we made this contract with the Shelby Chemical Company, we had sufficient charcoal to run those furnaces except only when conditions were such that other things failed. Sometimes

we had trouble with transportation, or other conditions, but we had ample capacity for running one furnace. When we were running two furnaces, we usually ran one on coke. There are time when anybody's supply fails from transportation and weather troubles. It was not from lack of manufacturing capacity. The negotiations between us and the Shelby Chemical Company were made by myself and Mr. Matthews, presi[illegible] of the Chemical Company. Col. A. C. Downing was never present or a party to any of these negotiations so far as I know. There were no negotiations between me and the Government as to the terms of the contract. That contract was made prior to the contract that the Shelby Chemical Company made with the Government. It was signed a few days in advance so the Government would sign the other contract. They refused to sign it unless they knew they had a source of supply. Mr. Matthews gave me this information. Mr. Matthews informed me that he could not secure his contract with the Government until he had secured from us or someone else a contract giving a supply of wood, water, power, housing facilities, etc. We were very desirous of getting an improved method of manufacturing wood, and we were also
92 desirous of furnishing what facilities we had for war purposes.

I do not know whether Mr. Matthews, president of the Shelby Chemical Company, had other locations under consideration or not. It was to our advantage to get an improved method of manufacture and that was the consideration in putting it there, getting an improved method of manufacture and a greater yield from our wood, otherwise we would not have considered it. I was informed by Mr. Matthews that this property would have to be conveyed to the Government and I consented only on the basis that if the Government did not sell the plant to him, it would be reconveyed and the plant moved. I was not present at any of the negotiations of the contract between the Shelby Chemical Company and the United States, but we insisted that that be written into the contract. I was aware that the contract existed and its principal terms. I did not insist upon this to the Government, but it was done. We demanded of Mr. Matthews that provisions be put in the contract. We had no dealings with the Government. The Government had knowledge of the contract when it was made. It is written into the contract between the Chemical Company and the Government. That was our insistence. It showed in the contract that the Government be notified and written notice be taken of the existence of the contract. We served no notice or copy of our contract to the Government prior to their making the contract with the Shelby Chemical Company. We gave it to Mr. Matthews. I gave the Government a copy of our contract with the Shelby Chemical Company when I was up there the early part of this year. I recall you (Mr. Richardson) being in Birmingham along about December or the first of
93 January and asking for a copy of the contract. I refused to give a copy of the contract, because we were discussing an entirely different feature. I told you I would give you an exact form

from the contract showing our ownership of the wood. You said that would be ample. Under the terms of the contract we made with the Shelby Chemical Company, the plant was to be operated by the Shelby Chemical Company, a third party. In the beginning we were entirely satisfied to make such a contract, but we were not satisfied with it after the operations started. The friction of two organizations working together, each one blaming the other for everything that happened. Our greatest loss was caused by them failing to carry it out at all. Our loss would have been material because the contract did not work out the way it was expected to work. Between one and a half years and two years they did not carry out the contract and furnish us with charcoal; all except a few months, due to market conditions, we operated our furnaces at full capacity. Our furnaces have been running practically ever since June of last year. We are operating about one-half capacity. It was always possible for us to furnish the Chemical Company with the necessary dry wood to go through its retorts and keep it running full capacity. We always furnished them while they operated. It has been difficult to get wood or anything else for the last several years in this part of the county, on account of labor and transportation troubles. It might now be difficult to get dry wood sufficient to go through those retorts at their full capacity at the present time, but it could be done. It would be at a high cost, and when labor is
94 short, it usually demands a premium. The Government never offered to sell us this property. The Government did ask us to make bids on the property, stating that they were going to sell it in February of this year. The Government or some of the Government's officers stated to me during the fall and winter of 1922 that they were going to sell it as soon as their agreement was out with the Shelby Chemical Company. That ran to the first of January, 1923. I do not know what was meant by agreement was out. I suppose the extension they had gotten from the Government, and I understood that they had gotten some extensions on payments. I was told in Washington that the Government could not sell the property until after the first of the year. Somebody in the office of the director of sales in the aircraft department told me this. The Government was at that time making no effort to get possession of the plant and did not, until the plant was turned over to them. This was a war plan. The Government advanced the Chemical Company the cost of the plant is the way it got in. I presume the Government paid for the erection of this plant on the property at Shelby. Mr. Matthews told me the Government was going to make a contract with him to construct it and were to pay for it. I understood it to be a fact that the Government was to pay for the construction of the plant. I remember Major Willis, from the office of the director of sales, calling at my office in October, I believe, 1922, in Birmingham, and I stated to Major Willis that the friction between the two companies, the Shelby Chemical Company and the Shelby Iron

Company, had grown so great that it had come to a point
95 where it was a question of either one or the other of them buying the other out. The Major and the department in Washington had already been advised of that by the Shelby Chemical Company. The Government had been advised that the Shelby Chemical Company had been negotiating to buy the plant of the Shelby Iron Company. I told Major Willis that it was essential for either of the two to be under the same ownership and the same management and that the Shelby Chemical Company had told us that they were negotiating with the Government for some sort of modification or extension of their contract, that they had an option on our plant and had assured us that they were making headway in exercising their option. That, however, if they did not exercise their option then the Shelby Iron Company would like to consider buying the improvements. I do not recall Major Willis telling me that the Government would make no further contracts with the Shelby Chemical Company or have any further dealings with them at that time. He told me just the reverse. That it was not objectionable to the Government to negotiate further with the Shelby Chemical Company, although they had had a great many troubles with them, but they would pay them sufficient money and give them sufficient guarantees as to the carrying out of the contract. We never made an offer to the Government for this plant prior to the Shelby Chemical Company being adjudged bankrupt, because the Shelby Chemical Company negotiating at the time for purchase of the plant from the Government or completion of the plant from the Gov-
96 ernment and they had asked us to draw up the papers for transfer of our property to them. I received that information from Mr. Dow's office, the vice president of the Shelby Chemical Company. The Shelby Chemical Company was still in existence, still had possession of the plant up to December 23d, and when they turned the plant over to the Government, we asked them why the plant had been turned back, and their explanation was that it was purely a matter of form to clear up the old contract and make a new one. I did not ask the Government why it was turned back or why the Government took possession. I confined all of my negotiations and dealings with the Shelby Chemical Company from the very start to the finish. I received notice of the Government's taking possession of this property almost immediately by phone. There was not any reason for notifying the Government that we claimed title of the property. It was in the contract that if they did not sell to the Chemical Company they were to reconvey the land to this company. I did not know at that time I had made a mistake in the deeds, but that made no difference. I made no demand on the Government, not at that time, but as soon as we knew that the Shelby Chemical Company had positively surrendered the plant and they were not going to be able to go forward with their trade and buy the Shelby

Iron Company's property which they had under option. We have never made any demand on the Shelby Chemical Company for the reconveyance of this property. We never made an offer to the Shelby Chemical Company to buy this property. There was no reason for our buying it; they were going to buy our property. We
97 found some advantages in the contract from the Shelby Chemical Company and some disadvantages. We reaped some benefit, yes, but not the benefit we expected to. In the contract with the Shelby Chemical Company we had the option to either buy or to have the plant removed. In our contract between the Shelby Chemical Company at the end of the first period of fifteen years we had either the right to renew or not to renew. We had either the right to buy or to say the plant should be removed and the land reconveyed. In the contract between the Shelby Chemical Company and the Government it is provided that the land would be reconveyed to the Shelby Iron Company and the plant removed within six months after the war.

Whereupon the following proceedings were had.

By Major WILLIS. You are not correct in that, I don't think. The contract between the Government and the Shelby Chemical Company provided that it would be reconveyed to the contractor.

Mr. CABANISS. Yes; to the Shelby Chemical Company.

The WITNESS. That is what he was asking. It was to be reconveyed to the Chemical Company, but if not to the Shelby Chemical Company, then they were to remove the plant within six months if they did not sell and convey to the Chemical Company.

Mr. CABANISS. They were to do both. If they did not sell to the Chemical Company, they were to remove the plant and also convey the title to the company.

The COURT. To the Shelby Iron Company?

98 Mr. CABANISS. To the Chemical Company.

Mr. KENNAMER. There was nothing in the contract between the Shelby Iron Company and the Government.

The COURT. Let's see what the provision is.

The WITNESS. There were practically the same conditions in our contract.

Mr. RICHARDSON. The contact between the Government and the Shelby Chemical Company provided this, that they were to sell to the Chemical Company and the Shelby Chemical Company would buy, and then it said if this sale was absolutely consummated the property should be conveyed. Then in another clause, it provides in case the Government is forced to take this plant over and complete it and operate it, then it would reconvey to the Chemical Company.

I would like to call your attention to the fact that there was any number of contracts made subsequent to this, between the Shelby Chemical Company and the Government, and there is nothing in

this contract to prohibit those two parties making any contracts they saw fit.

Mr. CABANISS. That is all for the defendant.

The COURT. Is there any rebuttal testimony?

Plaintiff's rebuttal evidence—Major James A. Willis, witness on behalf of the complainant

DIRECT TESTIMONY

I am an officer in the United States Army, major in the
99 Judge Advocate General's Department, in the office of the Assistant Secretary of War, as chief of the legal section of the sales division. I have been performing such duties since May, 1922. I have had several conversations with Mr. M. W. Bush, some letters from the Shelby Iron Company, relative to the purchase of this wood distillation plant at Shelby, Alabama. Early in October, our office received a telegram from the Shelby Iron Company. The telegram is dated October 2, 1922, and was addressed to Major Glenn E. Egerton, director of sales, Ordnance Building, Washington, and reads as follows:

"We have been advised by officers of Shelby Chemical Company that they have defaulted on their contract with the Government. Shelby Iron Company has long time contract with Shelby Chemical Company for total output charcoal, also other rights. Would be glad you wire our expense exact status contract. Further request no steps be taken disposition chemical plant until we can confer with you and have opportunity to protect our legal rights."

This is signed by the Shelby Iron Company, and was delivered at our office.

On October 2 the following reply was sent:

"Shelby Iron Company, Birmingham, Alabama. Your wire 2nd Shelby Chemical Company are in default and have not arranged to meet the obligations of the Government. Stop. Cannot advise
100 you the steps that will be taken by the Government nor promise any definite postponement. Signed Egerton."

A few days after receipt of that telegram, Mr. Bush came to my office. He said that he had received a telegram from his office directing him to ascertain exact status of contract between Government and the Shelby Chemical Company. I told him exactly what the status was; that the company was in default, that the Government proposed to take over the plant and sell it. We had quite a long conversation on different features of the matter, but nothing of importance except that he was not then in position to make a definite offer, but that he was returning home to his office in Birmingham and they would have a meeting of their board of directors and then be in a position to make a definite offer. In the conversation I stated to him that I would be in Nashville, Tenn., on the 14th, that was of October, and he requested me to come

down to Birmingham, when they would be in position to make an offer, and I would be present so the negotiations could be conducted. I came to Birmingham on the 16th, I think, Monday, the 16th of October. I called on Mr. Bush in his office in the American Trust Building down here, and he told me that they were not in a position to make any offer, they had no offer to make, that they were not in the chemical business, had not been in the chemical business, and before he could consider any offer, it would be necessary for him to make certain investigations, and that he would let me hear from him in about two weeks. During the conversation with reference to the contract the Government had with the Shelby Chemical
101 company, I told Mr. Bush that the Government would not consider any further dealings whatever with Mr. Matthews of the Shelby Chemical Company; that the only offer that would be considered from Mr. Matthews was cash payment of the balance due under his contract with the Government. That the Government proposed to sell the plant. Mr. Bush, in the conversation, both in Washington and in his office here, referred to the unpleasant dealings that he had had with Mr. Matthews. While here, he mentioned something about having seen Mr. Dow, and I think he included Mr. Matthews, and I inferred, I don't know that he stated it in so many words, I don't recall, but I inferred that there was some negotiations on between them. I returned to Nashville that night, but next morning had a call from Mr. Dow and Mr. Boysett, Mr. Matthews' secretary. They were informed that we would have no further dealings with Mr. Matthews. I heard nothing further from Mr. Bush until I received the telegram from him dated, I think, the 18th of November. I have that telegram as follows:

"November 18, Major James A. Willis, Department of Sales, Munitions Building, Washington, D. C. Since writing you 16th Dow, Merwin and associates have notified us of acceptance of our propositon made some days ago for purchase of all properties of Shelby Iron Company. We therefore with this trade consummated would not be interested in purchase of chemical plant. M. W. Bush, president, Shelby Iron Company."

102 The next day after receipt of the telegram I received this letter, written on the letterhead of the Shelby Iron Company, M. W. Bush, president, Birmingham, Alabama.

"November 16, 1922. Major James Arthur Willis, Judge Advocate, U. S. Army, War Department, Washington, D. C. My dear Major: I have been away from home almost entirely on various business matters since our conference in Birmingham. As I told you when the people represented by Mr. Dow, who had been figuring with the Shelby Iron Company with the idea of consolidating the Shelby Iron Company and the chemical plant into one company had intimated just before you reached Birmingham that they were working on a new line with the idea of buying both properties or consolidating them in accordance with their plans developed some

months ago. I told you then that you would probably be approached by Mr. Dow and his associates with the idea of reopening the matter or with the idea of taking over the chemical plant. It was my idea at that time that you thought it would be entirely agreeable with the Government for these parties to reopen the matter if they could put it in such shape it would be satisfactory to the Government. I understand from Mr. Dow that the matter has been reopened with your department. Our company for that reason has not taken the matter up further with you as we thought that if the proposition being worked out by Mr. Dow could be put
103 through it would probably be the best trade for the Government and the Shelby Iron Company.

"If for any reason there should be any hitch in the negotiations with Mr. Dow and his associates, I would be greatly obliged if you would wire me at my expense here as then the Shelby Iron Company would like to take the matter up with you directly as suggested both in Washington and in our conference at Birmingham.

"Thanking you in advance for the courtesy of wiring me as to the status of this matter, I am, with highest personal regards, Yours truly, M. W. Bush, president."

The associates Mr. Bush refers to there were not Mr. Matthews, because he had been informed that we would not deal with him; but Mr. Dow, who disavowed any further connection with Mr. Matthews, came to see us several times and made several offers with Mr. Merwin, of the Kerry Company of New York, and they were the people that were willing to consider in the negotiations, and not Mr. Matthews, nor the Shelby Chemical Company. It was not a question of a continuation of the contract with the Shelby Chemical Company but was to be a new trade out and out with the Kerry Company. The terms offered by the Kerry Company and Mr. Dow and Mr. Merwin were not satisfactory, and after it had been considered for some time, their offer was not accepted. The contract that I have referred to several times in my statement is not
104 the contract with the Shelby Chemical Company that is attached to the answer filed by the Shelby Iron Company. After the war an adjustment of the former contract between the Shelby Iron Company and the United States for the erection of this plant was had, and the plant was sold to the Shelby Chemical Company under a contract whereby they were to pay a certain price. I don't recall that just now, except that it is somewhere in the neighborhood of $260,000. The contract provided payments, certain terms, and stated times, and after having made one payment there were certain extensions of times, but the Shelby Chemical Company defaulted sometime in 1922; I have forgotten just the time. It is that contract that I have been referring to and not this one. Under that contract the Government sold the plant to the Shelby Chemical Company but retained title until the purchase price was paid. After default and in December of last year the plant was turned back to the Government. The Government at the time Mr. Bush called at

the office and when I was down here and for some time thereafter was in a position to consider any offer they might have seen fit to make. We were very anxious to make some disposition of the property, and the advisability of both plants—the Shelby Iron Company and the Shelby Chemical Company—being owned and operated by the same concern was considered and discussed, but having no offer from Mr. Bush and the offer made by Mr. Dow and Mr. Merwin being unsatisfactory, negotiations were entered into with another concern and those negotiations closed.

105 I told Mr. Bush both in Washington and in this city in October that the Government was going to resell the plant. I understood Mr. Bush was friendly towards the sale by the Government to Mr. Dow and his associates, who made an offer for it. About the time the negotiations were about closed for the sale of the property to other parties than Mr. Dow and associates, Mr. Bush made some objection, but prior to that time, and during the period, say from October up to February of this year, Mr. Bush never did file any objections with the Government against the sale of this property, as the Government might see fit. During the above referred to period, Mr. Bush did not in any of these conversations make claim to any equities against the properties. He claimed he had a contract with the Shelby Chemical Company but he did not refer at any time to the claim that he had a right to purchase the property under that contract or claim such right. The only thing he claimed under the contract was that the Shelby Chemical Company was to furnish him charcoal in return for which he was to furnish wood, water, power, etc. He referred in his telegram and one or two of his communications to the "other rights," but he did not mention anything except just what I have outlined here.

Whereupon the following proceeding were had.

Mr. RICHARDSON. Mr. Cabaniss, would Mr. Bush of the Shelby Iron Company be willing to admit there was a subsequent contract made between the Shelby Chemical Company and the Government, whereby the property was to be sold to the Chemical Company and the title retained?

106 Mr. CABANISS. I don't know. I will consider that with Mr. Bush. You won't be able to get through before lunch, and we will let you know.

Mr. RICHARDSON. We can get the original or we have photostat copies right here.

Mr. CABANISS. I think there would be no objection, but I would like to talk with Mr. Bush about it.

CROSS-EXAMINATION

I think I have the entire correspondence between Mr. Bush of the Shelby Iron Company and myself. I have a number of letters here from him either addressed to me or to the office. The correspondence I have in the file relates to the correspondence between Mr.

Bush and our office, and also some few letters in here are to others. In the telegram I read dated October 2, 1922, he closed by saying: "Further request no steps be taken disposition chemical plant until we can confer with you and have opportunity to protect our legal rights."

After that there were negotiations between Mr. Bush of the Shelby Iron Company and Mr. Dow relative to the purchase of the Shelby Iron Company's plant by Mr. Dow and associates. I do not know whether their negotiations were subsequent to that time, but there were continuing negotiations. All I know about the termination of the negotiations is the telegram from Mr. Bush of November 18, which reads:

107 "Since writing you 16th Dow, Mervin and associates have notified us of acceptance of our proposition made some days ago for purchase of all properties of Shelby Iron Company. We therefore with this trade consummated would not be interested in purchase of chemical plant."

That was subsequent to the time we had told him that the Government would consider an offer for the purchase of the plant. I do not know how long it was after that our office was notified or became informed that Mr. Dow and associates would not purchase the Shelby Iron Company's plant. They must have made at least half a dozen offers. I was never notified that they would not purchase. They continued for months trying to purchase it up until February or March or April, right along of this year. They were continuing their negotiations looking to the purchase. Trying to purchase it. But they had been informed along in January or February that negotiations had practically been closed for the sale of the property to another concern. I can't give the exact date. I gave them the information. I told Mr. Dow and Mr. Merwin personally. That was in January or February. Mr. Bush wired our office on March 2, 1923. The trade for the sale of this property was practically closed in February, they were in my office from time to time, but the contract was not signed until March. I think it is dated the 14th of March, I won't be positive. As far as I recall, we had closed the contract in February. I know so far as our office is concerned, it was closed sometime before the contract was finally prepared. Mr.

108 Bush was up there, and he came in to see us. I do not recall that we had any further communications after March 2nd. After the negotiations between the Government and Dow and associates terminated, I did not give Mr. Bush an opportunity to purchase the plant because he had told us he had sold his plant to Dow and associates. I did not understand that that was conditional on Dow and associates making sure of the agreement with the Government. The telegram of November 18 and his letter of November 16 was all I had from Mr. Bush on the subject up to some time in February or March. After I had closed the contract with the other people. In his letter of November 16, he had said that if Mr. Dow

and his associates did not purchase, why he would be interested and for us to let him know, but before I received that letter, I received a telegram from him saying that his offer had been accepted by Dow and associates for the purchase of all properties of the Shelby Iron Company. That telegram was dated November 18. I received the letter of November 16 after that, the day after. This telegram reads:

"Since writing you 16th Dow, Mervin and associates have notified us of acceptance of our proposition made some days for purchase of all properties of Shelby Iron Company. We therefore with this trade consummated would not be interested in purchase of chemical plant."

I did not understand and did not know that Dow's offer to
109 purchase the Shelby Iron Company was coupled with the purchase of the chemical plant. My information was exactly the opposite. I understood that they wanted both plants, but my information was that they had to take the Shelby Iron Company's property regardless of whether they got the chemical plant. That information came to me from Mr. Dow and Mr. Merwin. It was my understanding that Mr. Bush was under contract to dispose of the Shelby Iron Company's plant, that is only reason why. If I had not received that telegram from him, the moment that the other negotiations went through, I would have notified him, because I was really anxious for him to get it. We started negotiations with the other parties with whom we actually traded after I had been down here and returned to the office, I think, in November. I am not positive. Those negotiations had not been before I came to see Mr. Bush I had never heard of them. I don't think they were begun in the month of October. If it was, it was right at the last of October, because I never heard of it until after I returned home. I was down here about ten days or two weeks. I was down here. I was here and in Nashville. I never asked Mr. Bush or the Shelby Iron Company whether they had any options. I do not think he had anything to do with it, as a matter of fact. I did not know that he claimed right or option to purchase it. I didn't know that at all. The sale was made by the Shelby Chemical Company to the Government, the first sale, the sale in 1920. It was after the—it was in the sale they defaulted in and they subsequently defaulted in 1922.

They defaulted under their contract to purchase, and it was
110 after that that Mr. Bush came in and these different ones came in to negotiate for this purchase of the property. The sale was made after the Shelby Chemical Company defaulted in the payment. The sale was made to The Bon Air Coal and Iron Company. The Government sold it to the Bon Air Coal and Iron Company, under a contract dated March 14, but the negotiations had practically closed some weeks before that. The Government is now under contract to deliver the property. We have not delivered possession as yet. The Government has not yet made a deed to the Bon Air Company. Merely entered into a contract for its purchase and

ould have made a deed long ago had it not been for this trouble
ith Mr. Bush.
The Bon Air Company has not paid the consideration for the con-
act, but they are prepared to pay it as I understand. We have
t called on him for it because we have not delivered title. We
ve not been able to deliver. After the negotiations between the
overnment, Dow and his associates fell down, we made no sub-
quent offer to the Shelby Iron Company to purchase this property.
r. Bush was in the office once or twice about it, but we had then
osed the trade with the other people, as I recall it.
General Patrick is chief of the air service. I am not in the air
rvice, neither am I under General Patrick in any way. He had
thority under the arrangements for the sale of the surplus prop-
ty, each service that had the property in charge had the right to
gotiate for the sale, but they have not the right to consum-
mate the sale without the approval of our office. I was not
11 present at the conversation between Mr. Bush and General
Patrick. General Patrick was the proper person for Mr. Bush
take the matter up with for the purchase of the property. That is,
e could. I don't recall that General Patrick presented an offer
the Sales Board of which I am a member, an offer made by Mr.
ush in February of this year for the purchase of that plant. I
on't recall that any was submitted to the Board in our office, but
was called into General Patrick's office and had a talk with Gen-
al Patrick. Mr. Bush was not present. Concerning an offer that
r. Bush had made. An offer, I do not know what the offer was
w. At that time the trade had been closed with the Bon Air
ompany. I don't recall that the contract had been executed, but
e negotiations had. In other words, the minds had met. I don't
now whether General Patrick informed Mr. Bush there had been a
ade. I was not present.

Whereupon the following proceedings were had:

Mr. KENNAMER. With the settlement contract made between the
overnment and the Chemical Company, that is all of the evidence.
hey want to examine our copy of it. If they won't admit it, we
ant the original brought in from the office of the trustee in
ankruptcy.

Defendant's sub-rebuttal evidence—M. W. Bush

DIRECT EXAMINATION

12 I was in Washington in February and saw General Patrick
with reference to the purchase of this plant. I made a trade.
eneral Patrick said that the plant had not been sold, they were very
nxious to sell it, and clean up. For us to make an offer if we wanted
buy it. We did make an offer in writing. The offer was rejected

on the basis that it was not enough. We got two weeks further to increase the offer if we saw fit. Then when we went back to Washington in March, the early part of March, practically within the two weeks, the plant had still not been sold and the objection was this: That if we wanted to buy, we would have to bid on both, on the Shelby Iron Company's plant and on the plant in Tennessee. The Shelby Chemical Company's plant and the plant at Glenwood, Tennessee. General Patrick told me that they wanted to sell them together. We made an offer in cash to make the Government whole on its original contract as it informed us that they had made with the Shelby Chemical Company. It sold the plant for $260,000 or agreed to sell it, and had gotten $50,000 on account. We offered to pay $210,000 in cash. At first, we were only told it was not enough. We asked what would be agreeable to the Government and we would be glad to reframe our offer and meet their objections if it was reasonable and meet their offer if we could. They just said that it was not enough. Later when I went back to Washington, two weeks later, the reason given was that they were going to sell these plants together. I understood the reason why the separate organizations, Shelby Iron Company of Alabama was retained was because the Shelby brand of pig iron was very valuable to the
113 company, and they feared some company might be organized in Alabama, Shelby Iron Company of Alabama, or some very similar name and put out a brand of iron that would be confused and be detrimental to the Shelby Iron Company. That is my understanding as to why the separate organization was maintained.

I do not know who prepared those deeds. The company had attorneys in New York and also at Columbiana. I have been unable to find from our records who did prepare the deeds. I did not observe it at the time. I was away from home when the deeds were prepared, and they were on my desk, and I signed them very hurriedly without checking that error. I did not know of the error, nor did any of the attorneys, either for the Shelby Chemical Company, who examined the deeds, nor the Government attorneys ever detect the error. All of the attorneys fell down on it. The Government, the Shelby Iron Company, and all of the lawyers. All three sets of attorneys, as I see it, fell down on it. And it was called to my attention several months ago by our secretary sending me copies of all the papers, and that is the first time I knew anything about it.

CROSS-EXAMINATION

At the time I made the offer to General Patrick I offered $210,000 in cash. I was not, as a matter of fact, in that offer, carrying out or still negotiating with Mr. Dow and Mr. Merwin. If I had consummated that deal with the Government I was not going to sell the two plants to the reorganized company to be organized by
114 Mr. Dow and Mr. Mervin. I don't think it was possible because they had fallen down on that. I don't know whether

they would have renewed it or not. We would have been glad to sell the two together, because they were chemical people. Merwin said he didn't know whether they would have been able to carry out their contract or not. It is possible we might have renewed those negotiations. We would have been glad to. Our offer was made without any conditions or reservations. If we could we would have carried out the original negotiations because our company had other interests and we would have been glad to have sold both. Whether we could have sold it to them or not I don't know. Merwin told me when these negotiations were finally called off the latter part of January that later on if we could take the matter up and work it out satisfactorily he might be glad to do it. We had such a contract with Mr. Dow and his associates that we probably could have sued them on it. I don't know whether we could have ever made anything out of it or not. They agreed to purchase, but on condition of getting this plant in Shelby. It was understood between us that they would purchase from us, and the reason they wired us that they were ready to consummate the trade was the fact that they wired that they had practically closed in Washington for this plant, and that was the early part of November. Then from time to time they wired us and wrote and phoned us that negotiations were proceeding satisfactorily, and even got us on the 4th of January, after the plant had been surrendered to the Government, which they said was purely formal, and would be deeded back
115 to them on this new deal, which was to get rid of Matthews, because the Government didn't want any connection with him further. Our company had a meeting on the 4th of January and gave the authorization for the transfer of the Shelby Iron Company property. On the 10th of January Dow and his associates incorporated in Delaware, on January 10th, the Shelby Iron & Chemical Company to take over the two plants. They still thought, it would seem, that their negotiations with the Government were going to proceed all right. Finally, the latter part of January our people told them if they could not close with the Government, and could not close with us immediately, that we would cancel and call off all negotiations, which we did. Immediately after that, as soon as negotiations were absolutely dead and they told us they couldn't carry through, we got in touch as quickly as possible with the department. I was delayed here by a very severe storm that damaged some of our plants, and was only able to get to Washington about the 10th or 12th of February, and General Patrick advised me no contract had been closed. That was the 10th or 12th of February of this year. General Patrick advised me no contract had been closed for the sale of the property. That several people were probably negotiating, and would like to buy it, and they wanted to clean it up, and for us to make an offer, which we did in writing.

I notified General Patrick at that time that we would certainly object to the sale of the property to any third party and told him the reasons why and our legal rights in the matter. We were

116 granted ten days within which to submit a revised bid by General Patrick. We discussed a revised bid with General Patrick, but when we were advised no bid we would make on that plant would be considered, because the Government was going to sell the two plants together, we did not put in any further bid because it was not necessary. We advised the Government at that time that we expected to protect our legal rights in the matter. We had done everything that was reasonable and right to make the Government whole on its transaction to carry out the assessed value that it made on the plant. Just about that time I had discovered this alleged mistake. I did not tell General Patrick that we were going to endeavor to take advantage of that mistake. We told him we were going to protect our legal rights. That mistake made no difference as was pointed out. I mean that mistake was not the basis of our suit as was pointed out by our attorney to the Government. On the face of it the Shelby Iron Company was not a party to those deeds.

Whereupon the following proceedings were had.

Question. Is that true as a fact? You have sworn to it, that it is true as a fact.

Mr. CABANISS. That calls for a legal conclusion.

The COURT. My understanding is there is no dispute about the facts.

Mr. CABANISS. There is not a bit of dispute as to that.

Mr. RICHARDSON. I believe that is all.

117 The COURT. That is all of the evidence then, except that contract.

Mr. CABANISS. The contract.

Whereupon the following proceedings were had.

Mr. RICHARDSON. Here is the photostat of the contract subsequently made between the Government and the Shelby Chemical Company. Do you have any objection to that going in?

Mr. CABANISS. We have no objection to that subsequent contract going in with the understanding that if necessary the original may be substituted in its stead.

Mr. RICHARDSON. Yes. That can be done, the original can be substituted.

Mr. Bush testifying further as follows:

I never had any information or notice of this subsequent contract between the Government and the Shelby Chemical Company, that is now offered in evidence prior to the time this dispute arose between the Government and the Shelby Chemical Company, except Mr. Matthews told me that he had bought the plant. Then when we were furnished with a copy of those about three or four months ago, it turns out to be a lease, so I understand, and so the Government holds. The only information I had was from Mr. Matthews. He told me that he had bought the plant, so that we thought that was carrying out the original agreement. This, I understand, the Government says in a lease.

118 Whereupon the following proceedings were had.

Mr. RICHARDSON. Mark this Government Exhibit No. 1. It is stipulated by the parties hereto that exhibit marked Government Exhibit No. 1 is a true copy of the contract between the United States of America and the Shelby Chemical Company, and that the same was properly executed by those in authority. This contract which you introduced this morning, the building contract, was based on a contract signed the same day. It was a construction contract. That is, two contracts executed on the same day. They were made and executed at the same time, and one refers to the other. And the same stipulation with the same understanding is made with regard to the other contracts; if there is any discrepancy it can be corrected. This is Government's Exhibit No. 2.

Government's Exhibit No. 1

Contract No. 3548–A. Order No. 169

Contract No. 3552–A. Order No. 170

BUREAU OF AIRCRAFT PRODUCTION, UNITED STATES ARMY

This contract, made this 25th day of January, 1919, by and between Shelby Chemical Company, a corporation, of the State of Delaware, hereinafter called the "contractor," party of the first part, and the United States of America, hereinafter called the

119 "Government," party of the second part, represented by F. D. Schnacke, Captain, A. S., A. P., hereinafter referred to as the "contracting officer," acting under the authority and by the direction of the Secretary of War,

Witnesseth:

Whereas the parties hereto did heretofore enter into a contract, No. 3548, on Order No. 169, said contract being dated April 23, 1918; and Contract No. 3552, on Order No. 170, said contract being dated April 23, 1918, for

(a) the sale to the Government of the entire production of a plant to be erected by the contractor for the Government at Shelby, Alabama, after its erection and construction up to a maximum of four thousand two hundred tons (4,200) of acetate of lime and four hundred forty thousand gallons (440,000) of methyl alcohol; and

(b) the erection and construction for the Government at Shelby, Alabama, of a plant for the production of the said acetate of lime and methyl alcohol; and

Whereas, said plant is now only partially completed; and

Whereas, none of the said acetate of lime and methyl alcohol has as yet been produced by the contractor; and

Whereas, the Government has now no need for the acetate

120 of lime and methyl alcohol therein contracted for, and it is therefore in the public interest and in the interest of the Government to terminate said contracts as herein provided; and

Whereas, the contractor, in pursuance and in the performance of said contracts has incurred expenses and obligations in a total sum of approximately four hundred ninety thousand dollars; and

Whereas, the contractor, in pursuance and in the performance of said contracts has also incurred expenses for freight paid on material all ready delivered and freight to be paid on material yet to be delivered, but all purchased prior to December 1, 1918; and

Whereas, the Government, under the terms of said contracts, is legally bound to pay unto the contractor by way of reimbursement, all of said sums (less such sums as have been heretofore paid to it or for it by the Government on account thereof); and

Whereas, the contractor is relinquishing the prospective profits on the production and sale of the acetate of lime and methyl alcohol contracted for in said contracts; and

Whereas, the present fair commercial value of the said partially completed plant is not in excess of two hundred sixty thousand dollars (260,000); and

Whereas, the contractor is willing to accept from the Government in full and final settlement of all its rights, claims and demands against the Government under or growing out of said contracts

121 (a) a lease to the contractor by the Government of the said partially completed plant until the contractor has fully paid for the same as hereinafter provided, and thereafter a sale and conveyance to the contractor by the Government of the said partially completed plant and the Government's right, title and interest in and to the tract of land upon which the same is erected for the sum of two hundred sixty thousand dollars ($260,000) in the manner and upon the terms and conditions hereinafter described; and

(b) the payment by the Government to the contractor of the sum of four hundred ninety thousand dollars ($490,000) plus freight charges which have heretofore been paid by the contractor on account of the transportation of material necessary for the construction of said plant, and which the contractor may hereafter pay on account of the transportation of such material purchased by the contractor prior to December 1, 1918, less such sums as the Government has heretofore paid to or for the contractor on account of said contracts, including payments on account of said freight charges, and the Government, for the purpose aforesaid, is willing to make such lease, sale, conveyance, and payment unto the contractor;

Now therefore, in consideration of the premises and the mutual undertakings herein contained, the parties hereto agree as follows:

122 ARTICLE I

The parties hereto expressly agree hereby that the execution of this present contract shall, ipso facto, suspend, terminate, and cancel said contracts No. 3548 and No. 3552, together with any and all rights, obligations, claims, and demands whatsoever thereunder or

growing thereout, and that this present contract shall provide for and constitute a full and final settlement of all rights and obligations, claims, and demands, of either party against the other, and of all questions under or growing out of said contracts No. 3548 and No. 3552.

ARTICLE II

(1) The Government shall forthwith pay unto the contractor the net difference between (a) four hundred ninety thousand dollars ($490,000) plus such freight charges as have heretofore been paid by the contractor on account of the transportation of materials necessary for the construction of said plant at Shelby, Alabama, and which the contractor may hereafter pay on account of the transportation of such material purchased by the contractor prior to December 1, 1918, and (b) the total of such sums as the Government has heretofore paid to or for the contractor on account of contracts No. 3548 and No. 3552, or either of them, including all freight charges which the Government has heretofore paid to or for the account of the contractor on account of materials transported for the construction of said plant.

123 (2) Immediately upon the payment unto the contractor by the Government of the sum described in the last preceding section of this article, the Government shall forthwith become and be the absolute owner, free of all liens and claims whatsoever, of

(a) the aforementioned partially completed plant situated as aforementioned at Shelby, Alabama, and the tract of land upon which the same is located; and

(b) All other property real, personal, and or mixed that shall then have been paid for by the Government;

all of which items of property (described in (a) and (b) supra are enumerated in the inventory marked "Exhibit A," which is attached hereto and made a part hereof.

(3) As soon as the same can be conveniently done, the contractor shall provide and deliver to the Government such evidence as shall satisfy the Government that the contractor has in fact paid and or satisfied all legally binding debts, claims and or obligations incurred or contracted by it in connection with said contracts No. 3548 and No. 3552, or either of them.

ARTICLE III

(1) Immediately upon the payment unto the contractor by the Government of the sums described in Article II, section (1) of this contract, the Government shall and will lease (and the execution of this contract shall be understood to be and treated as con'tut-

124 ing such conclusive evidence by the Government and the acceptance by the contractor) unto the contractor for a term of years beginning forthwith and ending three years from the date of this contract, all of the property, real, personal, and or mixed, de-

to be executed by the undersigned contracting officer, duly authorized so to do.

SHELBY CHEMICAL COMPANY,
By W. H. MATTHEWS, *President.*
By M. A. BOISEN, *Secretary.*
UNITED STATES OF AMERICA,
By F. D. SCHNACKE, *Captain, A. S. A. P.*

Witnesses:
EDGAR LEE, Jr.
IRENE HANDLEY.

This will certify that the Board Review for the Air Service duly approved the foregoing contract on the 26th day of March, 1919.

G. I. ROWLEY, *Captain, A. S., S. P.*
Secretary, Board Review for the Air Service.

Order No. 170. Proposal No. ———
Contract No. 3552. Req. No. ———

Government's exhibit No. 2

SIGNAL CORPS, UNITED STATES ARMY, CONTRACT FOR EMERGENCY WORK

Construction or wood distillation plant this contract, made and concluded this 23d day of April, 1918, by and between the Shelby Chemical Company, a corporation organized under the laws of the State of Delaware, represented by W. H. Matthews its president hereinafter called the "contractor," party of the first part, and the United States of America, hereinafter called the "Government," represented by A. C. Downey, major, Signal Corps, United States Army, hereinafter called the "contracting officer," acting by authority of the Secretary of War, party of the second part.

129

Whereas, Congress has declared that war exists between the United States of America and the governments of Germany and Austria, constituting a national emergency, and the United States urgently requires the immediate performance, of the work hereinafter described, and it is necessary that said work shall be completed within the shortest possible time, and

Whereas, it is advisable under the disturbed conditions which exist in the contracting industry throughout the country for the United States to depart from the usual procedure in the matter of letting contracts, and adopt means that will insure the most expeditious results, and

Whereas, the contractor is ready to undertake the same upon the terms and conditions herein provided:

Now, therefore, this contract witnesseth, That in consideration of the promises and the payments to be made as hereinafter provided,

the contractor hereby convenants and agrees to and with the contracting officer as follows:

ARTICLE I

Extent of work. The contractor shall, in the shortest possible time, furnish the labor, material, tools, machinery, equip-
130 ment, facilities and supplies, and do all things necessary for the construction and completion of the following work:

A properly equipped wood chemical plant at Shelby, Alabama, for the production of acetate of lime and methyl alcohol with a daily capacity of approximately twenty thousand (20,000) pounds of acetate of lime and one thousand fifty (1,050) gallons of methyl alcohol, to be erected and equipped in accordance with drawings and specifications to be approved by the contracting officer, and subject to such supervision, direction, and instruction as he may deem wise.

The contracting officer may, from time to time, by written instructions or drawings issued to the contractor, make changes in said drawings and specification, issue additional instructions, require additional work, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications, and additions with the same effect as if they were embodied in the original drawings and specifications, the contractor shall comply with all such written instructions or drawings.

The title to all work completed or in course of completion shall be in the United States, and upon delivery to the site of the work, and upon inspection and acceptance in writing by the contracting officer, all machinery, equipment, hand tools, supplies, and materials, for which the contractor shall be entitled to be reimbursed under paragraph (a) of Article II hereof, shall become the property of
131 the United States. These provisions as to title shall not operate to relieve the contractor from any duties imposed hereby.

ARTICLE II

Cost of the work, the contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures made solely in the performance of said work as are included in the following items:

(a) All labor, material, machinery, hand tools not owned by the workmen, supplies, and equipment necessary for either temporary or permanent use for the benefit of said work; but this shall not be construed to cover machinery or equipment mentioned in section (c) of this article. The contractor shall make no departure from the standard rate of wages being paid in the locality where said work is being done, without the prior consent and approval of the contracting officer.

(b) All sub-contracts made in accordance with the provisions of this agreement.

(c) Reasonable rentals actually paid by the contractor for construction plant in sound and workable condition, such as pumps, derricks, concrete mixers, boilers, clam-shell or other buckets, electric motors, electric drills, electric hammers, electric hoists, steam shovels, locomotive cranes, power saws, engineer's levels and transits, and such other equipments as may be necessary for the proper and economical prosecution of the work.

132 (d) Loading and unloading such construction plant, the transportation thereof to and from the place or places where it is to be used in connection with said work, subject to the provisions hereinafter set forth, the installation and dismounting thereof, and ordinary repairs and replacements during its use in said work.

(e) Transportation and expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work, procuring labor and expediting the production and transportation of materials and equipment.

(f) Salaries of resident engineers, superintendents, timekeepers, foreman, and other employees at the field offices of the contractor in connection with said work. In case the full time of any field employee of the contractor is not applied to said work but is divided between said work and other work, his salary shall be included in this item only in proportion to the actual time applied to this work.

(g) Buildings and equipment required for necessary field offices, commissary and hospital, and the cost of maintaining and operating said offices, commissary and hospital, including such minor expenses as telegrams, telephone service, expressage, postage, etc.

(h) Such bonds, fire liability and other insurance as the contracting officer may approve or require; and such losses and expense, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained

133 (including settlements made with the written consent and approval of the contracting officer or his authorized representative) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the contractor.

(i) Permit fees, deposits, royalties, and other similar items of expense incidental to the execution of this contract, and necessarily incurred. Expenditures under this item must be approved in advance by the contracting officer.

(j) Such proportion of the transportation, traveling and hotel expenses of officers, engineers, and other employees of the contractor as is actually incurred in connection with this work.

(k) Such other items as should in the opinion of the contracting officer, hereinafter mentioned, be included in the cost of the work.

When such an item is allowed by the contracting officer, it shall be specifically certified as being allowed under this paragraph.

(l) Such reasonable fees, commissiones, or profits, as the contractor shall actually pay to any sub-contractor, agent or representative employed by the contractor in accordance with the terms of this agreement, for design, construction or supervision of the whole or any part of the work herein provided for.

134 No salaries of the contractor's executive officers, no part of the expense incurred in conducting the contractor's main office, or regularly established branch office, and no overhead expenses of any kind, except as specifically listed above, shall be included in the cost of the work.

(m) Since the contractor is not to receive any profit for the erection of said plants, or the purchase of machinery or materials therefor, the contracting officer agrees to pay to the contractor interest at current rates but not to exceed the rate of 6 per cent per annum on all monies advanced by it for labor, materials, machinery and equipment hereunder, from the time such advances are made until they are repaid to the contractor.

The contractor shall take advantage to the extent of its ability of all discounts available, and when unable to take such advantage shall promptly notify the contracting officer of its inability and its reasons therefor.

All revenues from the operating of the commissary, hospital or other facilities or from rebates, refunds, etc., shall be accounted for by the contractor and applied in reduction of the cost of the work.

ARTICLE III

As soon as conveniently may be done after the first day of each month, the contractor shall prepare and furnish to the officer in charge of the accounting section of the finance department of the equipment division of the Signal Corps of the United States Army, or his duly authorized representative, herein called the "ac-

135 counting officer," a statement showing as completely as possible:

(1) The cost of the work up to and including the last day of the preceding month.

(2) The cost of any materials furnished by the contracting officer up to and including such last day.

and the contractor at such time shall deliver to the accounting officer original signed pay rolls for labor, original invoices for materials purchased, and all other original papers not theretofore delivered supporting expenditures claimed by the contractor to be included in the cost of the work. And as soon as may conveniently be done thereafter, and in any event within 20 days, the accounting officer shall determine the amount of cost so incurred by the contractor, and payment therefor shall be made within ten days after such determination. Upon final completion of the said work, and

the delivery by the contractor of a release, or releases, forever discharging the United States of and from all manner of debts, claims and demands whatsoever arising under or by virtue of this contract to the contractor, or any other person whatsoever, any unpaid balance of cost shall be determined by the accounting officer and paid to the contractor within ten days after such determination.

No payments shall be due by the Government to the contractor on account of the buildings and permanent improvements to be erected by the contractor under this contract, until the title to the real estate upon which the same are erected, shall have become vested in the United States, and the Attorney General of the
136 United States shall have given his opinion upon the validity of the title as prescribed by law. These provisions shall not apply to the cost of machinery and equipment to be owned by the Government, including erection and installation thereof.

The determination of all costs and of all questions in regard thereto, shall be promptly made by and under the direction of the accounting officer in accordance with the terms of this contract; and such determination shall prevail, except that either upon the completion of the contract by the contractor, or whenever claims of cost amounting in the aggregate to five thousand dollars ($5,000) shall be disallowed by the accounting officer, the contractor may appeal to the board consisting of three officers to be appointed by the chief signal officer of the United States Army, and the decision of the majority of such board shall be final and binding upon both parties.

Payments shall be made upon, and only upon, voucher wherein the accounting officer, or his duly authorized representative, shall certify the amounts he has determined, and that the contractor is entitled to be paid the same in accordance with this contract.

ARTICLE IV

Inspection and audit. The contracting officer and persons designated by him shall at all times be afforded proper facilities for inspection of the work, and shall at all times have access to
137 the premises to the work and materials, and to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the contractor pertaining to said work; and the contractor shall preserve for a period of two years, books, records, and other papers just mentioned. Any duly authorized representative of the contractor shall be accorded the privilege of examining the books, records, and papers of the contracting officer relating to said work for the purpose of checking up and verifying the cost of said work. The system of accounting to be employed by the contractor shall be such as is satisfactory to the accounting officer.

, at any time, the accounting officer shall find that bills for r or materials, or other bills legitimately incurred by the con- tor hereunder, are not promptly paid by the contractor, the ernment may refuse to make further payments to the contractor l all such obligations past due shall have been paid. Should contractor neglect or refuse to pay such bills within five days r notice from the contracting officer so to do, then the Govern- t shall have the right to pay such bills directly, in which event direct payments shall not be included in the cost of work, to aid to the contractor, provided, that nothing herein shall be strued to require the contractor to make payment of any bills ong as, and to the extent that, liability therefor, shall be in l faith contested.

ARTICLE V

pecial requirements. The contractor hereby agrees that it will,
a) Begin the work herein specified at the earliest time practi- e, and diligently proceed so that such work may be completed he earliest possible date.
b) Promptly pay for all labor, material, or other services lered.
c) Procure, and thereafter maintain such insurance, in such ns and in such amounts and for such periods of time as the tracting officer may approve or require.
d) Procure all necessary permits and licenses, and obey and abide ll laws, regulations, ordinance, and other rules applying to such k, of the United States of America, of the State or Territory erein such work is done, of any subdivision thereof, or of any y constituted public authority.
e) Unless this provision is waived by the contracting officer, ert in every contract made by it for the furnishing to it of vices, materials, supplies, machinery, and equipment, or the use reof for the purpose of the work hereunder, a provision that contract is assignable to the United States; will make all such tracts in its own name, and will not bind or purport to bind the United States or the contracting officer hereunder.

(f) In every sub-contract made in accordance with the provisions hereof; require the sub-contractor to agree to com- fully with all the undertakings and obligations of the contractor ein, excepting such as do not apply to such sub-contractor's work.
g) At all times keep at the site of the work a duly appointed resentative who shall receive and execute on the part of the con- tor such notices, directions and instructions as the contracting er may desire to give.
h) At all times use its best effort in all its acts hereunder to pro- and subserve the interest of the contracting officer and the ited States.

ARTICLE VI

Right to terminate contract. Should the contractor at any time refuse, neglect or fail in any respect to prosecute the work with promptness and diligence, or default in the performance of any of the agreements herein contained, the contracting officer may, at his option, after five days written notice to the contractor, terminate this contract, and may enter upon the premises and take possession, for the purpose of completing said work, of all materials, tools, equipment, and appliances, and all options, privileges and rights, and may complete, or employ any other person or persons to complete said work. In case of such termination of the contract the contracting officer shall pay to the contractor such amounts of money on account of the unpaid balance of the cost of the work as
140 will result in fully reimbursing the contractor for the cost of the work up to the time of such termination, and the contracting officer shall also pay to the contractor reasonable compensation by way of rental for any equipment used in the completion of this contract, such compensation to be in accordance with paragraph (c) of Article II. The contractor hereby agrees that such payments when made shall constitute full settlement of all claims of the contractor against the contracting officer and the United States, or either of them, for money claimed to be due to the contractor by reason of this contract or work performed or to be performed under same. In case of such termination of the contract, the Government shall further assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor may have theretofore in good faith undertaken or incurred in connection with said work, and the contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers, and take all such steps as the Government may require for the purpose of fully vesting in it the rights and benefits of the contractor under such obligations or commitments. When the contracting officer shall have performed the duties incumbent upon him under the provisions of this article, the contracting officer and the Government shall thereafter be entirely released and discharged of and from any and all demands, actions, or claims of any kind, on the part of the contractor hereunder or on account hereof.

141 ARTICLE VII

Abandonment of work by contracting officer. If conditions should arise which in the opinion of the contracting officer make it advisable or necessary to cease work under this contract, the contracting officer may abandon the work and terminate this contract. In such case the Government shall assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor shall have, in good faith, incurred in connection with such work, and the contractor shall, as a condition of receiving the payments mentioned

in this article, execute and deliver all such papers and take all such steps as the contracting officer may require, for the purpose of fully vesting in the Government the rights and benefits of the contractor under such obligations and commitments, and shall further use his best efforts at the request and with the approval of the contracting officer to liquidate all such obligations and commitments at the least possible expense to the Government. The Government shall further pay to the contractor all costs and expenses incurred by the contractor in connection with the fulfillment of this contract up to the date of such termination. When the contracting officer shall have performed the duties incumbent upon him under the provisions of this article, the contracting officer and the United States shall thereafter be entirely released and discharged of and from any and all demands, actions, or claims of any kind on the part of the contractor hereunder or on account hereof.

142 ARTICLE VIII

Convict labor. No person or persons shall be employed in the performance of this contract who are undergoing sentence of imprisonment at hard labor imposed by the courts of any of the several States, Territories, or municipalities having criminal jurisdiction.

ARTICLE IX

Hours and conditions of labor. No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor, or any sub-contractor for any part of said work contemplated, shall be required or permitted to work more than eight (8) hours in any one calendar day upon such work, such prohibition being in accordance with the act approved June 19, 1912, limiting the hours of daily service of the mechanics and laborers on work under contracts to which the United States is a party. For each violation of the requirements of this article a penalty of five dollars ($5.00) shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which said employee is required or permitted to labor more than eight (8) hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the United States; Provided, that this paragraph shall not be enforced nor shall any penalty be exacted in case such violation shall occur while there
143 is in effect any valid Executive order suspending the provisions of said act approved June 19, 1912, or waiving the provisions and stipulations thereof with respect to either this contract or any class of contracts in which this contract shall be included, or when the violation shall be due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger of life or property, or by other extraordinary events or conditions on account of which, by subsequent Executive order, such past violation shall have been excused.

In the event of any dispute with reference to wages, hours, or other conditions appertaining to said work, between the contractor or any sub-contractor and labor employed by him on said work, the contractor or sub-contractor shall immediately notify the contracting officer of the existence of such dispute and the reasons therefor. The contracting officer may, at his option, instruct the contractor or sub-contractor involved in such dispute as to the method or steps which the contractor or sub-contractor should follow with reference thereto, and the contractor or sub-contractor shall thereupon comply with such instructions.

ARTICLE X

Right to transfer or sublet. Neither this contract, nor any interest therein shall be assigned or transferred. The contractor shall not enter into any subcontract for any part of the work herein specified in excess of five thousand dollars ($5,000.00) for any one contract, or in excess of a total amount of fifteen thousand
144 dollars ($15,000.00) in any one month, without the consent and approval in writing of the officer in charge of the approval section of the finance department of the Signal Corps. In case of such assignment, transfer or subletting, without such consent and approval, the contracting officer may refuse to carry out this contract either with the transferor or transferee, but all rights of action for any breach of this contract by the contractor are reserved to the United States.

ARTICLE XI

No participation in profits by Government officials. No Member of, or Delegate to, Congress, or Resident Commissioner, nor any other person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this article shall not apply to this contract so far as it may be within the operation or conception of section 116 of the act of Congress approved March 4, 1909 (35 Stats. 1109).

ARTICLE XII

Settlement of disputes. This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clauses, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the contractor shall consider himself
145 prejudiced by any decision of the contracting officer made under the provisions of Article III hereof, the matter shall be referred to the Chief Signal Officer of the United States Army for

determination. If the contractor feels aggrieved by the action of the Chief Signal Officer, it may, without prejudice to any of its rights, prosecute its claims in any courts having jurisdiction, to the same extent as if this Article XII were omitted herefrom.

ARTICLE XIII

This contract shall bind and inure to the contractor and its successors.

It is understood and agreed that wherever the words "contracting officer" are used herein, the same shall be construed to include his successor in office, any other person to whom the duties of the contracting officer may be assigned by the Secretary of War, and any duly appointed representative of the contracting officer.

Witness the hands of the parties hereto the day and year first above written all in triplicate.

SHELBY CHEMICAL CO.,
By W. H. MATTHEWS, *President.*
UNITED STATES OF AMERICA,
By A. C. DOWNEY, *Major S. C., U. S. A.,*
Contracting Officer.

Attest:
M. A. BOISEN, *Secretary.*
Attest:
Z. I. CHAPMAN.

146 Approved: April 25, 1918. By authority of the Chief Signal Officer (authorization of July 11, 1917).
H. S. BROWN, *Major, Signal Corps.*

In United States District Court

Judge's certificate to statement of evidence

The foregoing constitutes a full, true, and complete statement of the evidence, testimony, and exhibits introduced upon the hearing of the above styled proceeding had and taken before me and of the whole thereof, and the same is approved and allowed as true, full, and complete statements of the evidence, testimony and exhibits offered and introduced in the above styled proceeding and of the whole thereof, and,

It is further recited that all of the parties hereto have stipulated and agreed that the foregoing statement is a true, full, and complete statement of the evidence, testimony, and exhibits introduced in the above styled proceeding and of the whole thereof, and this statement is approved and allowed in accordance to and in compliance with Equity Rule No. 75 of the Supreme Court and all other rules of the Circuit Court of Appeals of this circuit applicable thereto, and,

It is ordered, that the same be filed and constituted part of the record of this cause and proceeding and for the purpose of the appeal herein and herefrom.

Dated this 11th day of January, 1924.

W. I. GRUBB,
U. S. District Judge.

Filed January 11, 1924.
CHAS. J. ALLISON,
Clerk.

147 In United States District Court

[Title omitted.]

Opinion

(Filed August 4, 1923)

MEMORANDUM

The facts stipulated entitle the plaintiff to a reformation of the deed from the Iron Company to the Chemical Company, unless the defendant has shown an independent equitable ground for a denial of the relief.

Defendant presents to such grounds:

1. That the consideration moving to the defendant has failed.

2. That the defendant, under the contract, had the right to a reconveyance of the land to it from the Chemical Company when the contract between it and the Chemical Company terminated—which the plaintiff was due to respect.

It seems to me the defendant has established the second ground. As between the defendant and the Chemical Company, the right of the defendant upon the termination of the contract between
148 it and the Chemical Company to have a reconveyance of the land in the event the defendant did not purchase the plant is fixed by the contract.

If the contract was terminated before its expiration through the fault or bankruptcy of the Chemical Company the same right to a reconveyance would exist. This right was available as against plaintiff upon either of two theories.

a. If there was an equity between the defendant and the Chemical Company, by which the defendant was entitled to a reconveyance of the land upon the termination of the contract, it was prior in point of time to plaintiff's equity, whether the latter arose under the original or subsequent contract between the plaintiff and the Chemical Company. The plaintiff being without the legal title, the equity prior in point of time is the prevailing one, and the defendant's equity is in that attitude.

b. It further seems to me that the plaintiff should be held to have contracted with the Chemical Company with notice of the Iron Company's equity to demand a reconveyance from the Chemical Company. The plaintiff had notice, when it contracted with the Chemical Company, that the Chemical Company was already in contract relation with the Iron Company to supply it with wood in return for charcoal. It is inconceivable that the plaintiff would have agreed to finance the Chemical Company in the construction of its plant to the extent of $400,000.00, unless and until it
149 knew that the terms of the contract between the Iron Company and the Chemical Company were such as to insure a successful operation by the Chemical Company. This could only have been determined through inspection of the contract between the Iron Company and Chemical Company. Plaintiff's contract with the Chemical Company contained a provision that if the plaintiff owned the plant, when its right to operate it had ceased by the termination of the war, it should within six months thereafter remove the plant and reconvey the land to the Chemical Company. The only interest that company could have had in a reconveyance was to comply with its obligation to convey back to the Iron Company. The evidence tends to show that this provision was inserted at the instance of the Chemical Company, because the Iron Company had insisted to it that the Government contract with the Chemical Company should contain such a provision. The contracting officer of the Government, knowing of the contract relation between the Iron Company and the Chemical Company; knowing that the successful operation of the plant the plaintiff was about to finance depended largely upon what kind of a contract this was; and knowing that the contractor was insisting on the insertion of a clause that was of interest to it only if it agreeing for the plaintiff that such a clause be inserted in the Government's contract; may well be inferred to was obligated to reconvey to the Iron Company, and have known of defendant's equity to have the land reconveyed at the end of the contract between it and the Chemical Company. If it had notice of this equity before it made its contract
150 with the Chemical Company then it was not a purchaser without notice, regardless of the passage of the legal title.

It seems a fair inference from the terms of the two contracts that the three contracting parties had in contemplation the return of the land to the Iron Company when both the Chemical Company and the plaintiff ceased to have the contractual right to longer operate the plant.

The contract between the Iron Company and the Chemical provided for a reconveyance at its termination; and it contemplated a conveyance to plaintiff by the Chemical Company only "during the period of a contract made between the Chemical Company and the United States Government, said contract to extend for the duration of the war."

The contract between the plaintiff and the Chemical Company provided for either a conveyance or a lease at the option of the Government. It provided for a repurchase of the plant by the contractors from the Government if an enabling act was passed. It limited the Government's right to operate the plant to the end of the war. If, when its right to operate ceased by the ending of the war, the Government had sold the plant to the contractors, then the Government agreed to surrender possession to contractor. If, on the other hand, the plant was then still owned by the Government, it was required to "at its own expense, within six months from the end of the war, remove all buildings and equipment constitut-
151 ing such plant from the ground upon which the same was erected, and shall without further consideration reconvey such ground to the contractor."

Reading the contracts together, it can be deduced that the plaintiff, the defendant, and the Chemical Company fully understood that the Government was to retain title to the land only for the purpose of and during the period of operation of the plant for it or by it; and that the contractor was to retain title to the land only during the period of the existence of an operating contract bewteen it and the defendant. For the purpose of securing reimbursement for advances made the Chemical Company, the Government looked, not to ownership of the land, but to the reserved right of removing the plant, within six months after operation had ceased, agreeing then to reconvey the land to the contractor, without regard the state of their mutual accounts. In no event was it contemplated that the Government would continue to own the lands after its right to operate or have operated the plant had ceased. The defendant knew of the proposed terms between the plaintiff and the Chemical Company before defendant contracted with Chemical Company; and the proper inference to be drawn from the contracts and the evidence is that the plaintiff also had knowledge of the terms of the contract between defendant and the Chemical Company. If so, the rights of the three parties were then fixed, and the plaintiff could not impair the equities which vested in the defendant, when the original contracts were entered into by a subsequent contract with the Chemical Company made without defendant's assent.

152 Though the subsequent contract affected a sale to the Chemical Company, the plaintiff rescinded the sale for nonpayment of purchase money and took the property into its possession by surrender of the Chemical Company in December, 1922. Subsequent negotiations between the plaintiff and defendant for the sale and purchase of the plant, which failed, did not constitute a waiver of the defendant's right to insist upon the return of the land, after it had failed to acquire the plant from the plaintiff.

The land was subject to use during the war for operation of the plant for account of the Government, and, after the war, if the Chemical Company acquired it from the Government, then for the period of its contract with the defendant. After the war had ceased

and after the contract between defendant and Chemical Company had terminated, the defendant was entitled to a return of the land, upon the condition that the plaintiff have six months within which to remove the plant. As between the plaintiff and the defendant the plaintiff acquired no right to sell the land and the plant on it to a stranger to reimburse itself for what it had lost by advancing the Chemical Company.

If the deed were decreed to be re-formed, the plaintiff would then be required to reconvey the land to the Chemical Company, the war having ended and the six months' period having expired. And the Chemical Company would then hold the title in trust to reconvey to the defendant, when their contract had terminated. Denying
153 re-formation of the deed and decreeing in favor of the plaintiff, the right to remove the plant from the land within six months from the date of this decree gives plaintiff all the relief to which it is entitled.

In United States District Court

[Title omitted.]

Final decree

(Filed August 4, 1923)

This case coming on now to be heard is submitted by the parties for final decree on the pleadings, the oral testimony, the stipulation of counsel and documentary evidence and after hearing the argument of counsel and being fully advised the court is of opinion that while the plaintiff has an equity for the reformation of the deed, as prayed in the amended bill, the defendant, Shelby Iron Company, a corporation under the laws of New Jersey, has a prior equity to have the title to the land described in the bill reconveyed to it on the termination of the contract between the Shelby Chemical
154 Company and the said Shelby Iron Company, a copy of which contract is set out as Exhibit "A" to the answer of said Shelby Iron Company to the bill as amended. It appears from the testimony that the said contract between the Shelby Chemical Company and the Shelby Iron Company has been terminated by the bankruptcy of the Shelby Chemical Company and its consequent inability to perform said contract. The court is of opinion, however, that the plaintiff is entitled to remove from the said lands described in the bill all buildings and equipment constituting the plant erected thereon by the Shelby Chemical Company and that the plaintiff should have six months from the date of this decree within which to make such removal.

It is therefore ordered, adjudged, and decreed that the plaintiff is not entitled to the relief prayed in the bill, but plaintiff shall have the right at its own expense within six months from this day to remove the said lands, all buildings and equipment constituting the plant erected thereon by the Shelby Chemical Company as

mentioned and described by the pleadings and proof in this cause, and after such removal is made plaintiff shall have no further right to the possession of said lands and such possession thereupon be delivered up and surrendered to the defendant, the Shelby Iron Company, a corporation under the laws of New Jersey.

It is further ordered and decreed that as between the plaintiff and the said defendant, the title to said lands is in said defendant and the plaintiff has no claim to or interest in the said lands
155 except that plaintiff is entitled to retain the possession of said lands for the removal of said plant for not exceeding six months from this date, and after such removal is made, and in any event on the expiration of six months from this date, the possession of said lands shall be surrendered by plaintiff to defendant.

(Signed) W. I. GRUBB,
Judge.

AUGUST 4, 1923.

In United States District Court

[Title omitted.]

Stipulation re transcript of record

In the above-entitled cause, it is agreed by and between counsel for the appellant and appelles, respectively, that the pleadings, orders, decree, records, and papers hereinafter designated shall be those embodied in the transcript of the record of the appeal in this case, and be certified by the clerk:

1. Original bill, filed May 4, 1923, and exhibits thereto.
156 2. Original subpœna to defendants, issued by the clerk May 4, 1923, and return of marshal thereon.
3. Answer of defendant, Shelby Iron Company of New Jersey.
4. Answer of defendant, Shelby Iron Company of Alabama.
5. Complainant's amendment to original bill of complaint.
6. Defendants' answers to amended bill with exhibits.
7. Complainant's motion to strike paragraphs of defendants' answer to amended bill.
8. Complainant's replication to defendant's amended answer.
9. Statement of evidence.
10. Stipulation of counsel as to evidence.
11. Defendant's direct testimony.
12. Testimony of M. W. Bush, direct.
13. Cross-examination of M. W. Bush.
14. Plaintiff's rebuttal evidence, by Major Jas. A. Willis.
15. Direct testimony.
16. Cross-examination of Major Jas. A. Willis.
17. Defendant's sur-rebuttal evidence, by M. W. Bush.
157 18. Direct examination.
19. Cross examination.

20. Complainant's exhibits—Exhibit 1.
21. Complainant's exhibits—Exhibit 2.
22. Opinion of court.
23. Final decree.
24. Judge's certificate.
24½. Stipulation of counsel.
25. Petition for appeal.
26. Assignment of errors.
27. Order allowing appeal.
28. Citation.
29. Clerk's certificate.

C. B. KENNAMER,
Attorney for Appellant.
CABANISS, JOHNSTON, COCKE & CABANISS,
Attorneys for Appellees.

158 In United States District Court

[Title omitted.]

Petition for appeal

(Filed January 4, 1924)

To the Honorable W. I. Grubb, Judge of the District Court of the United States for the Northern District of Alabama:

The United States of America, complainant, in the above styled cause, respectfully shows unto your Honor that a decree was rendered and entered in the above entitled cause on the 4th day of August, 1923, denying to the plaintiff all further right to the possession of the lands described in complainant's original bill and requiring complainant to surrender to the defendant such lands; said decree decreeing that the title to said lands is in the defendants, and that plaintiff has no claim to or interest in the said lands, except plaintiff is entitled to retain possession of said lands for the removal of a
159 certain plant for not exceeding six months from the said decree, and thereafter decreeing to the defendant the possession of said lands and requiring this complainant to surrender its possession to the defendant, and that this complainant feeling aggrieved by the decree rendered and entered in said cause on the said 4th day of August, 1923, it has hereby appealed from said decree to the Circuit Court of Appeals for the 5th Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that this bill be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents and evidence upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 5th Circuit, under the rules of said court in such case made and provided.

And your petitioner further shows that it is the United of America, a government sovereign, and should not be required to give bond or security for said appeal.

THE UNITED STATES OF AMERICA.
By its United States Attorney, C. B. Kennamer,
for the Northern District of Alabama.
C. B. KENNAMER,
United States Attorney.

Filed January 11, 1924.
CHAS. J. ALLISON,
Clerk.

160 In United States District Court

[Title omitted.]

Assignment of errors

(Filed January 11, 1924)

To the Honorable W. I. Grubb, Judge of the District Court of the United States for the Northern District of Alabama:

The United States of America, complainant in the above styled proceedings, conceiving itself aggrieved by the final decree entered in the said cause on, to-wit, the 4th day of August, 1923, denying to this complainant the relief prayed for in the original bill and the amendments filed thereto, hereby files the following assignment of errors on appeal from said decree of this Court, of date the 4th day of August, 1923.

161 (1st) The court erred in decreeing that the defendant, Shelby Iron Company, a corporation under the laws of New Jersey, has a prior equity to have the lands described in the original bill reconveyed to it on the termination of the contract between the Shelby Chemical Company and the said Shelby Iron Company.

(2nd) The court erred in failing to grant the relief prayed in and by the bill of complaint, as amended.

(3rd) The court erred in decreeing that the conplainant shall have no further right to the possession of the lands described in the original bill after six months from date of said decree.

(4th) The court erred in finding and decreeing that as between the plaintiff and the defendants, the title to the lands described in the original bill, is in said defendants, and that the plaintiff has no claim to, or interest in said lands, except that plaintiff is entitled to retain the possession of said lands for the removal of the plant, for not exceeding six months from the date of said decree.

(5th) The court erred in not decreeing that the title to said lands is in the complainant.

(6th) The court erred in decreeing that the title to said lands is in the defendants.

(7th) The court erred in its finding and holding that the plaintiff should be held to have contracted with the Chemical Company, with notice of the Iron Company's equity to demand a reconveyance (of the property in question) from the Chemical Company,
162 for the reason that there is no evidence that the plaintiff had any knowledge or notice of the Iron Company's equity or right to demand a reconveyance (of the property in question) from the Chemical Company.

(8th) The court erred in finding the plaintiff had knowledge and notice of the terms, condictions and provisions of the contract between the Shelby Iron Company of New Jersey and the Shelby Chemical Company of Delaware, for the reason that there is no evidence or testimony to sustain such finding or conclusion and no evidence or testimony that the plaintiff had any knowledge or notice of such contract.

(9th) The court erred in finding that the plaintiff had knowledge and notice of that provision of said contract between the Shelby Iron Company of New Jersey and the Shelby Iron Company of Delaware, which provided for the reconveyance of the property involved in this proceeding by the said Shelby Chemical Company to the said Shelby Iron Company, for the reason there is no evidence or testimony to sustain such finding, and for the further reason that there is no evidence or testimony from which such notice or knowledge to plaintiff can be inferred or deduced.

(10) The court erred in decreeing that the defendant, Shelby Iron Company, a corporation under the laws of New Jersey, has a prior equity to have the lands described in the original bill reconveyed to it on the termination of the contract between the Shelby Chemical Company and the said Shelby Iron Company, for the
163 reason that the evidence does not show that the said Iron Company of New Jersey has any prior equity to the said lands, and for the further reason that the evidence or testimony does not show that the plaintiff had any knowledge or notice of such equitable right of the said Iron Company, if any at all ever existed.

(11th) The court erred in failing to grant the relief prayed in and by the bill of complaint, as amended, for the reason that the evidence in the cause showed plaintiff's right to the relief prayed for.

(12th) The court erred in decreeing that the complaint shall have no further right to the possession of the lands described in the original bill after six months from the date of said decree, for the reason that under the deed to the plaintiff of said lands, the plaintiff was possessed of the fee thereof and entitled to the possession thereof without limitation.

(13th) The court erred in finding and decreeing that as between the plaintiff and the defendants, the title to the lands described in the original bill, is in said defendants, and that the plaintiff has no claim to, or interest in said lands, except that plaintiff is entitled to retain the possession of said lands for the removal of the plant, for not exceeding six months from the date of said decree, for the reason

that under the deed to the plaintiff of said lands, it was vested with the fee thereof and entitled to the possession thereof without limitation.

(14th) the court erred in not decreeing that the title to
164 said lands is in the complainant, for the reason that under the deed to the plaintiff of said lands, the title thereof was vested in the plaintiff.

(15th) The court erred in decreeing that the title to said lands is in the defendants, for the reason that the defendants had by deed conveyed the title of said lands to the plaintiff, vesting the plaintiff with the title thereof in fee.

Dated this 11th day of January, nineteen hundred and twenty-four.

C. B. KENNAMER,
United States Attorney.

165 In United States District Court

[Title omitted.]

Order allowing appeal

(Filed January 11, 1924)

The United States of America, complainant in the above-styled cause, having this day presented its petition for appeal from this court to the Circuit Court of Appeals for the United States for the Fifth Circuit, from the decree of this court, dated the fourth day of August, 1923, denying the complainant the relief prayed for, and this court having duly considered the same, it is hereby ordered that the said appeal be allowed and it being shown unto the court that the appellant is the United States of America, a Government sovereign, is therefore not required to give bond for the taking of this appeal.

This, the 11th day of January, 1924.

W. I. GRUBB,
U. S. District Judge.

166 [Citation in usual form showing service on Cacaniss, Johnston, Cocke & Cabaniss omitted in printing.]

167 [Clerk's certificate to foregoing transcript omitted in printing.]

168 [Minute entry of argument and submission, Dec. 15, 1924, omitted in printing.]

169 In the United States Circuit Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA, APPELLANT
versus
SHELBY IRON COMPANY, APPELLEE
No. 4284

Appeal from the District Court of the United States for the Northern District of Alabama.

John B. Keeble, special asst. to the Attorney General; C. B. Kennamer, U. S. Attorney (Jno. B. Keeble, Jr., special asst. to the Attorney General, on the brief), for appellant.

E. H. Cabaniss (Cabaniss, Johnston, Cocke & Cabaniss on the brief), for appellee.

Opinion filed March 10, 1925

Before Walker and Bryan, circuit judges, and Clayton, district judge.

BRYAN, circuit judge:

The United States filed a bill in equity against the Shelby Iron Company to quiet the title to a tract of about fifteen acres of land. The bill traces title from the Iron Company to the Shelby Chemical Company by a deed which misdescribes the grantor, and from the Chemical Company to the United States. The defense of the Iron Company is that it was entitled to a re-conveyance of the land from the Chemical Company by virtue of a contract between them, upon the faith of which the Iron Company made its deed;
170 and that the United States acted throughout with notice of the contract and of the provision for re-conveyance. The answer offers to do equity, by purchasing the improvements and buildings which the United States put upon the land and by paying the fair and reasonable value thereof, or by allowing their removal within a reasonable time.

The Shelby Iron Company is a manufacturer of charcoal iron, In April, 1918, it was also manufacturing its own charcoal by the use of kilns, and supplying itself with wood, out of which it made charcoal, from a large tract of hard wood timber which it owned. About that time the Shelby Chemical Company, an entirely separate and distinct corporation, notwithstanding the similarity of names, represented to the Iron Company that it had been organized for the purpose of manufacturing charcoal and other by-products, including acetate of lime and methyl alcohol, by a modern and improved process of retort distillation, which would produce from the same quantity of wood practically one-third more charcoal, of a better quality than could be produced by the kiln method. The Chemical Company further represented to the Iron Company that it was then negotiating for a contract to manufacture and sell to the United States large quantities of acetate of lime and methyl alcohol, which were required for war purposes, but that it could not

secure such contract from the Government unless and until it had first made satisfactory arrangements for the supply of a sufficient quantity of wood, and the furnishing of adequate plant facilities including water, steam, power, and houses for its workmen. Thereupon the two companies entered into a contract dated April
171 8, 1918, by the terms of which the Iron company agreed to supply to the Chemical Company a site and enough cord-wood to operate the chemical distillation plant to its maximum capacity of 100 cords per day, to erect 36 workmen's houses at an average cost of $1,000 each, and to furnish the necessary water, steam and power. The chemical Company on its part agreed to convert the cord-wood into charcoal and to supply the Iron Company with charcoal at a stated price per cord. The contract was to remain in effect until 1933, with the option to the Chemical Company to extend it for a further period of five years. It also contains the following provision:

"The Iron Company further agrees to deed by good and sufficient deed of general warranty, free from all liens and encumbrances, for the consideration of one dollar ($1.00) sufficient ground on which to erect and construct the plant and buildings of the Chemical Company together with the tracks of the Chemical Company. Inasmuch as the United States Government will be financially interested in the construction of the Chemical Company's plant, it is expressly agreed that said real estate may be deeded to and vested in the United States Government during the period of a contract made between the Chemical Company and the United States Government, said contract to extend for the duration of the war."

and

"It is understood that the Chemical Company is about to construct its plant under a contract with the United States Government, by the terms of which the Chemical Company is to become the owner of the land, buildings, equipment and improvements, if an enabling statute to that effect shall be passed by the Congress of the
172 United States. Therefore, it is distinctly agreed that the foregoing provision as to reconveyance of the lands is subject to the obtaining of the title to said lands by the Chemical Company from the United States Government."

It is further provided that, upon the termination of the contract, the Chemical Company should reconvey without cost the land in controvesy, free from lien or encumbrance, to the Iron Company, and that the latter should have the right at its option to purchase all improvements and equipment placed thereon at a price to be fixed by arbitration. There was no other consideration for the contract than the mutual convenants of the contracting parties.

On April 23, 1915, the Chemical Company entered into a contract with the United States for the construction of a plant for the manufacture of acetate of lime and methyl alcohol. It was estimated that the plant would cost $400,000, which the United States agreed to

advance and reimburse itself by deductions from payments to be made for the acetate of lime and methyl alcohol. That contract recites:

"Whereas, the contractor has a contract with the Shelby Iron Company of Shelby County, Alabama, according to the terms of which the Shelby Chemical Company shall receive all the lumber it may require from timber lands owned and leased by the Shelby Iron Company in return for all charcoal derived therefrom."

and contains the following:

173 "The contractor will grant and convey, or, at the option of the Chief Signal Officer of the Army will lease to the United States for the consideration of one dollar ($1.00) a tract of land at Shelby, Alabama, of adequate size and suitable location for the erection of the plant hereinafter described."

It also requires the Government to sell and the Chemical Company to buy the plant at its fair market value, but the "obligation of the Government to sell said plant as in this article provided is conditioned upon its having the legal authority to make such sale and conveyance." Another provision which is considered to be material is as follows:

"It is agreed, however, that in case the Government takes over said plant or undertakes to operate it, by reason of the default of the contractor, or for any other reason, the Government's right to operate the same shall, except as may be expressly provided by statute, cease and terminate at the end of the present war. If at that time the sale of said plant to the contractor shall have been consummated, the Government will surrender possession thereof to the contractor, and if said plant is then still owned by the Government it shall at its own expense, within six months from the end of said war, remove all buildings and equipment constituting such plant, from the ground upon which the same are erected, and shall without further consideration reconvey such ground to the contractor."

The president of the Iron Company testified that he became cognizant of the principal terms of this contract before it was

174 signed, that as first drawn it did not contain the last quoted provision, and that he insisted that a clause be inserted containing the substance of that provision. This witness did not claim to have had a personal conference with the officer representing the Government, but he further testified that before the Iron Company executed its deeds he had examined a copy of the Government's contract. On the other hand the Government officer, who was a major in the Signal Corps of the Army, did not testify, and there was no denial that he had actual knowledge of all the provisions of the Iron Company's contract. It was in pursuance of these two contracts that the deeds, upon which the United States relies to establish title, were executed.

The Iron Company spent about $50,000 in changing and equipping its plant so as to comply with its contract. A plant was constructed on the land that cost the United States $490,000. It was not com-

pleted, however, until the latter part of 1919. The war having ended in the meantime, the United States had no further use for acetate of lime or methyl alcohol, and in January, 1919, it entered into a new contract for the sale of the plant to the Chemical Company for $260,000, payable $50,000 cash and the balance in three annual instalments. The United States was declared to be the owner of the land, and was given the immediate right to demand a deed from the Chemical Company, and that company's right to purchase was forfeitable in the event of its default in making any of the required payments. The Chemical Company made the $50,000 cash payment, and in April, 1919, executed a deed of the land to the United States. It manufactured and delivered charcoal to the
175 Iron Company from the time the plant was completed until March, 1922, but since the last mentioned date neither it nor any one for it has complied with the Iron Company's contract. The Chemical Company failed to make any of the deferred payments required by its last contract with the United States, and in January of 1923 was adjudicated a bankrupt.

The land involved in this suit forms a part of the site upon which the Iron Company's manufacturing plant is located, and the new chemical distillation plant is located in the midst of the Iron Company's plant and forms an integral part of it. By this plan of arrangement the Iron Company was enabled to comply at less expense and more efficiently with the Government's requirement for wood, water, steam, power, and trackage facilities. The two plants could not well be operated independently of each other. After the Chemical Company ceased operations, the Iron Company made an effort to purchase from the Government the buildings and equipment constructed by it, and offered to pay therefor the balance of $210,000 due by the Chemical Company, but the Government declined to accept this offer, and instead made a contract to sell the plant at the same price to a competitor in business of the Iron Company.

The district judge, being of opinion that the officer who represented the Government had actual knowledge of the contract between the Iron and Chemical Companies, and of all its provisions, entered a decree denying the relief prayed for in the bill, but granting to the United States the right at its own expense to remove its buildings and equipment within six months from the date of the decree,
176 and requiring at the expiration of that time that possession of the land be surrendered to the Iron Company. The United States appeals.

As between the two companies, the Iron Company became entitled to demand a reconveyance and take possession of the land, because the breach and bankruptcy of the Chemical Company operated as effectually to terminate their contract as if it had expired by limitation of time. The contractor was not prevented from carrying out its agreement to reconvey at the termination of the contract by the clause which made reconveyance dependent upon its obtaining title from appellant and upon an enabling statute being enacted author-

izing the contractor to become the owner of the land, buildings, equipment and improvements; because it is admitted that the enabling act, therein referred to, was passed. The case turns on the question whether appellant had knowledge or notice of the terms and provisions of appellee's contract. We agree with the district judge that the attending facts and circumstances are sufficient to show that the officer representing the Government had actual knowledge of such terms and provisions. That the officer knew of the existence of that contract is conclusively shown by the reference in the Government's contract to the provision relating to the supply of wood. The contract was available to him, and ordinary care would have demanded a familiarity with its provisions. It is a fair inference that appellant would not have entered upon an undertaking of such magnitude as this was without first ascertaining whether the contractor would be able to furnish not only wood but all the other essentials of successful manufacture, such as water, steam and power. The Chemical Company had no plant of its own and the success of its undertaking depended upon its contract
177 with appellee. In no other way could appellant be asured that acetate of lime and methyl alcohol could be manufactured on the scale required by it than by an examination of appellee's contract. That contract provides that the title to the land might be vested in the United States, but only during the war. The Government's contract contains a corresponding provision, and it is apparent, not only from the testimony of appellee's president, but also from an examination of appellant's contract, that this provision was not at first inserted, because there is an inconsistent provision to the effect that appellant might retain the plant to a later date, and then convey it to the contractor in the event it should have the legal authority to do so. A reasonable explanation of this inconsistency is that the clause to the effect that appellant's title should not extend beyond the war was inserted after the contract was prepared. It must have been apparent to the Government officer that the Chemical Company was not demanding the change made in the contract on its own account, because it would be a matter of no concern to it whether the title remained in the Government or in the Iron Company, since in either contingency its rights were protected by a contract. The Government officer must have known therefore that an additional provision was being demanded in behalf of appellee, the only other party at interest. In the absence of any denial or explanation, the conclusion is justified that as appellee had knowledge of the contents of the Government's contract, so the Government officer had knowledge of the contents of appellee's contract. But if it be conceivable that the Government officer had no actual knowledge of appellee's rights, we are of opinion that the facts and circumstances
178 just stated are sufficient to impute notice to appellant of the contents of appellee's contract. Undoubtedly that officer knew that appellee was a party to a contract which affected to some extent appellant's relations with the Chemical Company. "It will

not do for a purchaser to close his eyes to facts—facts which were open to his investigation, by the exercise of that diligence which the law imposes. Such purchasers are not protected." Brush *v.* Ware, 15 Pet. 93, 110. In Livingston *v.* Maryland Insurance Co., 7 Cr. 506, it is said: (537) "It is a general rule, that a paper, which expressly refers to another paper, within the power of the party, gives notice of the contents of that other paper." Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, is to the same effect. See also 20, R. C. L. 353.

Authorities are cited to the proposition that the Government is not bound by the laches or neglect of its agents, but they have no application where the effect of notice is involved. The Government is as much bound by notice to one of its agents as is an individual or private concern. It comes into equity as any other suitor when it seeks to assert rights to property. Brant v. Bank of Washington, 10 Pet. 596. The clause in appellant's contract, already copied above, with reference to re-conveyance, clearly discloses the intention that at the end of the War the rights of the Government in the land and the plant should cease. Appellant itself agreed that it should have no further right than to remove its buildings and equipment within six months, and that it would thereupon re-convey the
179 property. Having obtained title under the terms of the contracts, and with notice or knowledge of appellee's rights, appellant could not thereafter acquire a title free from such rights by taking a deed from the Chemical company. It never was contemplated by either contract that appellant should have the right to continue to own the land or to convey it to a stranger.

Appellee offers to pay the fair and reasonable value of the buildings and equipment, and more cannot equitably be required of it. Of course, appellant cannot be compelled to accept that offer, and is within its rights if it chooses to dismantle and remove that part of the plant which it caused to be constructed.

The decree of the district court is affirmed.

180 In United States Circuit Court of Appeals

[Title omitted.]

Judgment—March 10, 1925

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed.

181 In United States Circuit Court of Appeals

[Title omitted.]

Petition for Appeal—Filed May 8, 1925

The United States of America, appellant in the above styled cause, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit, and judgment has therein been rendered on the 10th day of March, 1925, affirming the judgment of the United States District Court for the Northern District of Alabama.

In said decree, the Court declared the right, title, and interest in the real estate described in the pleadings and in the brief, was vested in the Shelby Iron Company, a corporation organized under the laws of the State of New Jersey, and that appellant, the United States of America, had no right, title, or interest in and to said land, save and except that it was authorized to retain possession of said lands for six months, in order to accomplish the removal of a plant that appellant had erected upon said property, and it was provided in said decree that if such removal is not made within six months

182 from the date of the decree, then and in that event, the United States of America should surrender possession of the real estate in question to the Shelby Iron Company aforesaid.

Appellant states that the matter in controversy in said suit exceeds one thousand dollars, besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Fifth Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellant prays that an appeal be allowed them in the above entitled cause, directing the Clerk of said United States Circuit Court of Appeals for the Fifth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellants may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

UNITED STATES OF AMERICA,

By (Signed) C. B. KENNAMER,
United States Attorney.

(Signed) JNO. B. KEEBLE,
Special Assistant to the Attorney General.

183 In United States Circuit Court of Appeals

[Title omitted.]

Order allowing appeal—filed May 8, 1925

It is hereby ordered, that the appeal in the above entitled cause, to the Supreme Court of the United States, be, and the same is hereby, allowed as prayed.

MAY 5, 1925.

(Signed) R. W. WALKER,
United States Circuit Judge, Fifth Circuit.

184 In United States Circuit Court of Appeals

[Title omitted.]

Assignments of error—filed May 8, 1925

Now comes the Appellant, the United States of America, by C. B. Kennamer and John B. Keeble, its solicitors, and says that in the record and proceedings herein, there is manifest error, and that the United States Circuit Court of Appeals for the Fifth Circuit erred in this:

I

In holding and deciding that the only right, title or interest that the United States of America had in and to the land described in the pleadings was the right to remove the improvements and structures erected upon said land within a period of six months from the date of the decree of the court.

II

The court erred in holding and deciding that the title to the land described in the pleadings and in the decree of the court was
185 not vested in the United States of America in fee simple.

III

The court erred in holding and deciding that the United States of America had actual notice of the provisions in the contract between the Shelby Chemical Company, by which provisions the Shelby Chemical Company had contracted under certain terms and conditions to reconvey the land in question to the Shelby Iron Company.

IV

The court erred in holding and deciding that the United States of America had constructive notice of the provisions of the contract between the Shelby Iron Company, aforesaid, and the Shelby Chemical Company by which provisions the Shelby Chemical had contracted under certain terms and conditions to reconvey the land in question to the Shelby Iron Company, aforesaid.

V

The court erred in holding and deciding that the United States of America contracted with the Shelby Chemical Company with notice of the right of the Shelby Iron Company to demand a reconveyance of the property in question from the Shelby Chemical Company.

VI

The court erred in holding and deciding that the United States of America had no right, title, and interest to the lands described in the pleadings superior to the right, title, and interest that he Shelby Iron Company, organized under he laws of the State of New Jersey, had in and to said property.

VII

The court erred in holding and deciding that the title to said
186 lands described in the pleadings is in the Shelby Iron Company, a corporation organized under the laws of the State of New Jersey, for the reason that under the deed to the United States of America conveying said lands, title in fee simple vested in the United States of America.

VIII

The court erred in holding, deciding, and decreeing that the title to said lands is in the Shelby Iron Company, organized under the laws of the State of New Jersey, for the reason that the said Shelby Iron Company had by deed conveyed the title to said lands to the Shelby Chemical Company, and that company had conveyed the lands to the United States of America, which accepted said deeds without any notice of the claims of the Shelby Iron Company, aforesaid, and by virtue of said deeds the United States of America was vested with title thereto in fee.

Wherefore, appellant prays that said judgment and decree of said United States Circuit Court of Appeals may be reversed in all things.

Respectfully submitted,

(Signed) JNO. B. KEEBLE,
Special Assistant to the Attorney General.

187 In United States Circuit Court of Appeals

[Title omitted.]

Stipulation as to amount involved—filed May 8, 1925

In this cause, it is stipulated between the parties, United States of America and Shelby Iron Company, a corporation organized under the laws of the State of New Jersey, and Shelby Iron Company, or-

ganized under the laws of the State of Alabama, that the fair value of the property involved in this case is in excess of One Thousand Dollars, exclusive of costs.

UNITED STATES OF AMERICA,
By (Signed) JNO. B. KEEBLE,
Solicitor.

SHELBY IRON COMPANY,
(Organized under Laws New Jersey.)
By (Signed) CABANISS, JOHNSTON, COCKE & CABANISS,
Solicitor.

SHELBY IRON COMPANY,
(Organized under Laws Alabama.)
By (Signed) CABANISS, JOHNSTON, COCKE & CABANISS,
Solicitor.

188 In United States Circuit Court of Appeals

[Title omitted.]

Stipulation as to transcript of record—filed May 8, 1925

In this cause, it is stipulated between the parties, that the entire record of the Circuit Court of Appeals shall be certified to the Supreme Court of the United States.

(Signed) E. H. CABANISS,
CABANISS, JOHNSTON, COCKE & CABANISS,
Attorneys for Appellee.

(Signed) JNO. B. KEEBLE,
Attorneys for Appellant.

189 [Clerk's certificate to foregoing transcript omitted in printing.]

190 [Citation in usual form showing service on E. H. Cabaniss.]

(Indorsement on cover:) File No. 31,225. U. S. Circuit Court Appeals, 5th Circuit. Term No. 123. The United States of America, Appellant, vs. Shelby Iron Company of New Jersey and Shelby Iron Company of Alabama. Filed May 23d, 1925. File No. 31,225.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 123

THE UNITED STATES OF AMERICA, APPELLANT

v.

SHELBY IRON COMPANY OF NEW JERSEY AND SHELBY IRON COMPANY OF ALABAMA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the District Court is found at page 74 of the record. The opinion of the Circuit Court of Appeals (R. 83) is reported in 4 F. (2d) 829.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 10, 1925. (R. 88.) Petition for appeal was filed and allowed on May 8, 1925. (R. 89, 90.) The jurisdiction of this Court rests on Section 241 of the Judicial Code as it stood prior to the effective date of the Act of February 13, 1925.

QUESTIONS PRESENTED

The case involves questions as to the respective rights of the United States and the Shelby Iron Company, a New Jersey corporation (hereinafter called the Iron Company), in a certain tract of land located in Shelby, Alabama. This tract was deeded by the Iron Company to the Shelby Chemical Company (hereinafter called the Chemical Company) pursuant to a contract between the Iron Company and the Chemical Company which recited that the Chemical Company was desirous of erecting a chemical wood-distillation plant thereon and provided for the reconveyance of the land to the Iron Company upon the termination of the contract. The contract expressly contemplated, and by implication permitted, the Chemical Company to place a mortgage upon the land to which the right to receive a reconveyance should be subordinate. The deeds erroneously described the Iron Company as "a corporation organized under the laws of the State of Alabama." The United States subsequently, pursuant to a contract with the Chemical Company, erected on the land in question a plant for the production of certain products resulting from wood distillation, the United States remaining at all times the owner of the plant. Thereafter the Chemical Company deeded the land to the United States under a supplemental contract which required such a deed and which further provided for a lease of the land and plant to the Chemical Company for three years at rentals aggregating

$260,000 (which the contract stated to be at least the fair commercial value of the plant), and a sale by the United States and purchase by the Chemical Company of the land and plant for $1 at the expiration of the lease, or, at the option of the Chemical Company, at any prior time upon payment of the difference between the total rentals of $260,000 and the sum of all rentals theretofore paid. The questions presented are:

(1) Did legal title to the land pass from the Iron Company to the Chemical Company, and from the Chemical Company to the United States, despite the erroneous description of the Iron Company in the deeds to the Chemical Company?

(2) If legal title passed from the Iron Company to the Chemical Company, and from the Chemical Company to the United States, did the United States at the time it acquired such title have notice, actual or constructive, of the Iron Company's right to receive a reconveyance upon the termination of its contract with the Chemical Company?

(3) Was the deed from the Chemical Company to the United States an absolute conveyance which was in violation of or subject to the Iron Company's right to receive a reconveyance of the land upon the termination of its contract with the Chemical Company, or merely a conveyance in the nature of a mortgage to secure performance by the Chemical Company of its obligation to pay the rental or purchase price provided for in the supplemental contract with the United States, and, as

such, contemplated and by implication permitted by the contract between the Iron Company and the Chemical Company to be placed upon the land in priority to the Iron Company's right to receive a reconveyance?

STATEMENT

The United States brought suit in the United States District Court for the Northern District of Alabama, Southern Division, against the Iron Company and Shelby Iron Company, an Alabama corporation (hereinafter called the Alabama Company), alleging that the land in question in the case had been deeded by the Iron Company to the Chemical Company, and by the Chemical Company to the United States; that the United States had been in peaceable possession of the premises since December 23, 1922; and—

> That complainant's title to said land is denied or disputed by the defendants and that the defendants are now asserting or claiming to have some right or title or interest in or to said lands or to holding a lien or an incumbrance of some kind thereon * * *.

The bill prayed a decree that the defendants had no claim, right, title, interest in, or incumbrance upon the land, and "such other, further, and general relief as the equities of this cause" might require. (R. 1–3.)

The answer of the Iron Company denied that it had deeded the land to the Chemical Company, and

alleged that on October 1, 1890, the land had been deeded to it by the Alabama Company; that the Alabama Company had made and executed deeds purporting to convey the land to the Chemical Company; that at the time said deeds were made the Alabama Company had no title to or interest in the land, and therefore neither the Chemical Company nor the United States obtained any right, title, or interest in or to the land under said deeds; and that the Iron Company had never parted with the title to the land obtained under the deed from the Alabama Company. The answer set forth in conclusion that the United States had no title to the land and that "such title resides in this defendant." (R. 3–5.)

The answer of the Alabama Company denied that the Iron Company deeded the land to the Chemical Company, and alleged that the Alabama Company made and executed the deeds to the Chemical Company; that the Alabama Company did not deny or dispute the title of the United States or assert or claim "any right, title, or interest in or to said lands or a lien or encumbrance thereon;" and that on October 1, 1890, the Alabama Company conveyed to the Iron Company all of its real estate, including the land in question, and since that date had had no title to, interest in, or claim upon the land in question. (R. 5–6.)

Both the answer of the Iron Company and the answer of the Alabama Company were sworn to by Morris W. Bush, as President. (R. 5, 6.)

The United States filed an amendment to the bill of complaint (R. 6, 7), by which it added an allegation that by the conveyance to the Chemical Company—

> it was the true intention of the parties to convey all of the right, title, and interest of the Shelby Iron Company, a corporation of New Jersey, but that through mistake, or fraud, or inadvertence, said conveyance was made and executed from the Shelby Iron Company, a corporation of Alabama. (R. 7.)

The prayer for relief was also amended to ask the court to decree—

> that the conveyance made and executed by the said Shelby Iron Company, a corporation of Alabama, be reformed so as to make it a conveyance by the Shelby Iron Company, a corporation of New Jersey, as was the true intent of the parties at the time said conveyance was made by the Shelby Iron Company, a corporation of Alabama. (R. 7.)

The Iron Company then filed an answer to the bill as amended. (R. 7–36.) It alleged, first, that the United States was not entitled as against the Iron Company to have the deeds made by the Alabama Company reformed—

> for the reason that this defendant was not a party to any of said deeds, the grantor therein being a separate and distinct corporation, this defendant being in no wise re-

sponsible for any of the acts or omissions of the Shelby Iron Company, a corporation organized under the laws of the State of Alabama. (R. 7.)

It further alleged that the United States was not entitled as against the Iron Company to either a reformation of the deeds or a conveyance of the lands for the following reasons: That a contract dated April 8, 1918, was made by the Iron Company and the Chemical Company whereby the Iron Company was to deed to the Chemical Company sufficient ground on which to erect and construct a plant and buildings for the manufacture of charcoal and other by-products of wood distillation, and was to furnish the Chemical Company with a sufficient quantity of hard wood to operate the plant and other facilities for use in such operation, and the Chemical Company was to deliver charcoal to the Iron Company and was to reconvey the land to it upon the termination of the contract.

That the contract provided that the land might be deeded to and vested in the United States for the duration of the war. That the Chemical Company and the United States entered into a contract dated April 23, 1918, which recited that the Chemical Company had a contract with the Shelby Iron Company, of Shelby County, Alabama, according to the terms of which the Shelby Chemical Company shall receive all the lumber it may require from timberlands owned and leased by the Shelby Iron Company in return for all charcoal derived there-

from," and provided that the Chemical Company would grant and convey, or at the option of the Chief Signal Officer would lease, to the United States for the consideration of one dollar, a tract of land of adequate size for the erection of a plant for the production of certain by-products of wood distillation, that the United States would assume the expense of erecting the plant, that the entire output of certain by-products would be sold to the United States, that the Chemical Company might purchase the plant on certain terms, and that the United States would remove all buildings and equipment constituting such plant within six months from the end of the war and would reconvey the land to the Chemical Company if at the termination of the war the plant was still owned by the United States. That the plant was completed in 1919 and charcoal produced thereby was delivered to the Iron Company thereafter until about March 31, 1922. That the Chemical Company ceased to operate the plant at about that date and has since made no delivery of charcoal therefrom to the Iron Company. That on April 10, 1919, the Chemical Company made a deed to the United States reciting a consideration of $1 and other good and valuable considerations, which deed purported to convey the real estate on which the plant had been constructed.

The answer further alleged: That the Chemical Company did not have the legal title to the real estate, which was in the Iron Company, although

the deeds made by "The Shelby Iron Company, a corporation organized under the laws of the State of Alabama," had purported to convey the real estate to the Chemical Company. That on December 23, 1922, the Chemical Company, without the knowledge or consent of the Iron Company, and to the prejudice of the rights of the Iron Company, surrendered possession of the plant to the United States, and the United States has been in possession of the plant without having ever attempted to operate the same or to comply with the terms of the Chemical Company's agreement with the Iron Company to deliver charcoal to it. That on or about January 19, 1923, the Chemical Company was adjudicated a bankrupt. (R. 7–12.)

The answer concluded that by reason of the premises, the consideration moving to the Iron Company for the execution of said agreement with the Chemical Company had wholly failed; that the Chemical Company had disabled itself from carrying out the contract and making delivery of charcoal to the Iron Company; that the United States had no authority under the law to operate the plant or to carry out the terms of the contract, and that it would be grossly inequitable, unfair, unjust, and oppressive to the Iron Company for it to be compelled to convey the real estate to the United States. It prayed that the answer might be treated as a counterclaim and that it might be ordered and decreed that the deed from the Chemical Company to the United States should be can-

celed as a cloud on the title of the Iron Company, and that the possession of the premises on which the plant was situated should be delivered up by the United States to the Iron Company within such time and on such equitable terms as might be fixed by the court. (R. 12, 13.)

The answer contained no allegation that the United States had notice of the contract between the Iron Company and the Chemical Company except the allegation concerning the rental in the contract between the Chemical Company and the United States.

The United States filed a reply in which it alleged that the Iron Company was a party to the deeds in question; that it was the true intent and purpose of the Iron Company when the deeds were executed to convey all of its right, title, and interest to the land, and that as to the other matter alleged in the answer to its amended bill the United States—

> neither admits nor denies the matters and things therein set forth, but does assert that its rights under the original bill as amended filed in this cause are in no wise affected by any of the matters and things set forth * * *. (R. 36, 37.)

After evidence had been taken the court entered a decree that as between the United States and the Iron Company—

> * * * the title to said lands is in said defendant and the plaintiff has no claim to

> or interest in the said lands except that plaintiff is entitled to retain the possession of said lands for the removal of said plant for not exceeding six months from this date, and after such removal is made, and in any event on the expiration of six months from this date, the possession of said lands shall be surrendered by plaintiff to defendant. (R. 78.)

This decree was affirmed by the Circuit Court of Appeals. (R. 88.)

From the documentary and other evidence, it appears: After the Alabama Company conveyed all of its property to the Iron Company in 1890, the Alabama Company continued in existence but thereafter transacted no business and had no assets. The Iron Company owned the stock of the Alabama Company and its officers acted as the officers of the Alabama Company. (R. 43.) There was testimony that the existence of the Alabama Company was probably continued only for the purpose of protecting the name in Alabama. (R. 56.) Mr. Bush, the president of the Iron Company, who also acted as president of the Alabama Company, was authorized by the Board of Directors of the Iron Company to enter into the contract with the Chemical Company and to transfer the land in question in this case by warranty deed. He did not discover the error in the description of the grantor until three or four months before he testified, in August, 1923. At the time the deeds were given he delivered possession of the property to

the Chemical Company. He attempted and intended to execute the deeds for the Iron Company under the terms and conditions of the contract with the Chemical Company. (R. 43, 44.)

The contract dated April 8, 1918, between the Iron Company and the Chemical Company under which the Iron Company was to furnish the Chemical Company with land upon which to erect a plant for the manufacture of charcoal and by-products of wood distillation, and was also to furnish the Chemical Company with the wood, steam, electric energy, water, etc., necessary for the operation of the plant, and the Chemical Company was to deliver to the Iron Company the charcoal manufactured at the plant, contained the following provisions which are important (R. 16, 17, 18):

> Third. The Iron Company further agrees to deed by good and sufficient deed of general warranty, free from all liens and encumbrances, for the consideration of one dollar ($1.00) sufficient ground on which to erect and construct the plant and buildings of the Chemical Company together with the tracks of the Chemical Company. Inasmuch as the United States Government will be financially interested in the construction of the Chemical Company's plant, it is expressly agreed that said real estate may be deeded to and vested in the United States Government during the period of a contract made between the Chemical Company and the

United States Government, said contract to extend for the duration of the war.

* * * * *

Eighth. This contract shall extend until April 1st, 1933, with the right upon the part of the Iron Company to extend the same for a further period of five years upon notice in writing to the Chemical Company at any time on or before Oct. 1, 1932. Upon the termination of this contract on April 1, 1933, or at the end of the five-year renewal period herein provided, *the Chemical Company shall reconvey to the Iron Company all of the lands herein provided to be conveyed to it by the Iron Company, without cost to the Iron Company, free and clear of any encumbrances or liens whatsoever, or if there is any mortgage or there are any mortgages on the same not yet due, the Chemical Company shall pay over to the Iron Company the amount thereof or the amount of any bonds outstanding thereunder, with any accrued interest thereon,* and shall, if the Iron Company so elects and so notifies the Chemical Company by notice in writing, mailed to it at least thirty days prior to the termination of this contract or the five-year extension thereof, sell to the Iron Company all the improvements, equipment, and other personal property placed on said lands of said Chemical Company, and the price to be paid by said Iron Company to said Chemical Company shall be determined in the following manner: each of the parties hereto shall choose one arbitrator, who shall appraise

said property, and in the event that said two arbitrators can not agree upon the appraised value thereon, they shall choose an umpire, and the decision of one arbitrator and the umpire shall be conclusive and binding on both parties, provided, however, that should the Iron Company elect not to acquire said properties, the Chemical Company shall have six months time following the termination of this contract or the five-year renewal thereof, as the case may be, in which to remove all of the improvements, buildings, equipment, machinery, and other personal property placed on said lands by the Chemical Company, and said Chemical Company shall be obligated to restore said lands to the condition in which they were at the time of the execution of this contract as nearly as may be practicable.

It is understood that the Chemical Company is about to construct its plant under a contract with the United States Government, by the terms of which the Chemical Company is to become the owner of the land, buildings, equipment and improvements, if an enabling statute to that effect shall be passed by the Congress of the United States. Therefore, it is distinctly agreed that the foregoing provision as to reconveyance of the lands is subject to the obtaining of the title to said lands by the Chemical Company from the United States Government. (Italics ours.)

By deeds dated June 11, 1918, and June 17, 1918, land was conveyed to the Chemical Company pur-

suant to the above contract, the grantor being described, however, as "the Shelby Iron Company, a corporation organized under the laws of the State of Alabama." (R. 31–34.) The deeds were signed merely "Shelby Iron Company" without reference to the State of organization. (There was a third deed dated October 7, 1918, which described the grantor merely as "Shelby Iron Company, a body corporate" (R. 34, 35), but this covered a small piece of land which was not covered by the deed from the Chemical Company to the United States and we have therefore disregarded it in our discussion of the case.)

By the contract dated April 23, 1918, between the Chemical Company and the United States (R. 19–28), the latter was to construct, at an estimated cost of approximately four hundred thousand dollars, a plant for the production of certain by-products of wood distillation on land conveyed or leased to the United States at its option. The Chemical Company was to operate the plant and the United States was to purchase the by-products. The United States was to retain certain portions of the purchase price to constitute "depreciation and amortization" and "purchase" funds, and when these equaled the cost of the plant, with interest, the contractor was to purchase the plant at an amount which was called an appraised valuation, but which was really, through adjustment of rentals, to be the amount of its cost to the Government with interest at six per cent. (R. 23, 24.)

The contract contained, among others, the following recital (R. 19):

> Whereas, the contractor has a contract with the Shelby Iron Company of Shelby County, Alabama, according to the terms of which the Shelby Chemical Company shall receive all the lumber it may require from timberlands owned and leased by the Shelby Iron Company in return for all charcoal derived therefrom.

The following provisions of the contract are also important (R. 20, 25):

> ARTICLE I. The contractor will grant and convey, or, at the option of the Chief Signal Officer of the Army, will lease to the United States for the consideration of one ($1.00) dollar a tract of land at Shelby, Alabama, of adequate size and suitable location for the erection of the plant hereinafter described.
>
> Said conveyances shall be made subject to and upon the completion of an opinion by the Attorney General of the United States that by said conveyance the Government will derive an absolute title to the said premises in fee simple, free and clear of all encumbrances, and that the United States will have the right to expend money for the erection of improvements thereon.
>
> * * * * *
>
> ARTICLE VII. * * * It is agreed, however, that in case the Government takes over said plant or undertakes to operate it, by reason of the default of the contractor, or for any other reason, the Government's right

> to operate the same shall, except as may be expressly provided by statute, cease and terminate at the end of the present war. If at that time the sale of said plant to the contractor shall have been consummated, the Government will surrender possession thereof to the contractor, and if said plant is then still owned by the Government, it shall at its own expense, within six months from the end of said war, remove all buildings and equipment constituting such plant, from the ground upon which the same are erected, and shall without further consideration reconvey such ground to the contractor.

Article XVII contained provisions requiring the Chemical Company to purchase and the United States to sell the plant at an appraised value upon termination of the contract by the Government because of cessation of hostilities or a general armistice bringing hostilities to a close. (R. 27, 28.)

Under date of January 25, 1919, the war having ended and the United States having no further need for the material covered by its contract with the Chemical Company (none of which had yet been produced), it entered into a supplemental contract with the Chemical Company. (R. 59–64.) This supplemental contract recited that the United States desired to cancel the contract of April 23, 1918, and the construction contract made pursuant thereto (R. 64), and that the Chemical Company in pursuance and in performance of said contracts

had incurred expenses and obligations of approximately $490,000, and in addition certain expenses for freight, all of which the United States was legally bound to pay "by way of reimbursement." (R. 59, 60.) It also contained the following recitals (R. 60):

> Whereas, the present fair commercial value of the said partially completed plant is not in excess of two hundred sixty thousand dollars ($260,000); and
>
> Whereas, the contractor is willing to accept from the Government in full and final settlement of all its rights, claims and demands against the Government under or growing out of said contracts (*a*) a lease to the contractor by the Government of the said partially completed plant until the contractor has fully paid for the same as hereinafter provided, and thereafter a sale and conveyance to the contractor by the Government of the said partially completed plant and the Government's right, title and interest in and to the tract of land upon which the same is erected for the sum of two hundred sixty thousand dollars ($260,000) in the manner and upon the terms and conditions hereinafter described; and (*b*) the payment by the Government to the contractor of the sum of four hundred ninety thousand dollars ($490,000) plus freight charges which have heretofore been paid by the contractor on account of the transportation of material necessary for the construction of said plant, and which the contractor may hereafter pay on

account of the transportation of such material purchased by the contractor prior to December 1, 1918, less such sums as the Government has heretofore paid to or for the contractor on account of said contracts, including payments on account of said freight charges, and the Government, for the purpose aforesaid, is willing to make such lease, sale, conveyance, and payment unto the contractor.

The supplemental contract then provided that it should effect a termination of the prior contracts, that the United States should pay the Chemical Company the amount of its expenses and obligations, and that upon such payment the United States should become and be the absolute owner, free of all liens and claims whatsoever, of the partially completed plant, the tract of land upon which the same was located, and all other property then paid for by the United States. (R. 60, 61.) It further provided as follows (R. 61–63):

ARTICLE III

(1) Immediately upon the payment unto the contractor by the Government of the sums described in Article II, section (1), of this contract, the Government shall and will lease (and the execution of this contract shall be understood to be and treated as con'tuting such conclusive evidence by the Government and the acceptance by the contractor) unto the contractor for a term of years beginning forthwith and ending three

years from the date of this contract, all of the property, real, personal, and/or mixed, described in Article II, section (2) of this contract, upon the following terms and conditions, viz:

(*a*) The contractor shall pay unto the Government immediately upon the execution of this contract the sum of fifty thousand dollars ($50,000) to apply on account of the rental of the plant during said period, and in one year from the date of this contract the contractor shall pay the further sum of fifty thousand dollars ($50,000); and two years from the date of this contract, the further sum of seventy-five thousand dollars ($75,000); and in three years from the date of this contract, the further sum of eighty-five thousand dollars ($85,000); all of which sums shall apply as rental for the said property during said period;

(*b*) In addition to the afore-described rent, and as additional rental, all taxes of every kind whatsoever, if any, levied or assessed upon said property, or any of it, by any taxing power, during the period of the time beginning with the date of this contract, and ending three years thereafter, shall be paid by the contractor at its own expense; and

(*c*) The contractor shall, at its own expense, complete said plant as early as possible, and in no event later than June 1, 1919, and shall keep and maintain all of the said property, including said plant, in good condition and repair.

(2) At the expiration of three years from the date of this contract, the Government, for the consideration of the sum of one dollar ($1), shall and will sell and convey unto the contractor by proper instrument or instruments of conveyance and the contractor shall and will purchase from the Government for said sum all of the Government's right, title and interest in and to the property described in Article II, section (3) of this contract, in its then state of repair and condition, whatever the same may be. Should the contractor not then being in default for any unpaid payments required to be paid by it under the terms of this contract, desire at any time prior to that date, to purchase said property in its then state of repair and condition, it is expressly agreed that the Government shall and will forthwith sell and convey the same unto the contractor for a sum equal to the difference between (*a*) the sum of two hundred sixty thousand dollars ($260,000) and (*b*) the total sum of all rents (exclusive of amounts for taxes previously paid by the contractor), then previously paid unto the Government by the contractor.

(3) It is expressly agreed that, should the contractor at any time default in any of the payments required by it to be made unto the Government under the provisions of this Article III, the Government may, at its election,

(*a*) waive such default; or

(*b*) treat and regard the hereby given lease and obligation and privilege to purchase as forfeited; or

(*c*) treat and regard the hereby given lease as a continuing legal and binding obligation, but the obligation and privilege to purchase as forfeited.

In the event of the Government making election (*b*) or election (*c*) supra, any and all payments made prior then to by the contractor, shall, *supa facto*, be forfeited to and become the absolute property of the Government, free from any and all claims and are equities of the contractor.

* * * * *

ARTICLE VI

The Government may, at its option, instead of requiring a deed to the land on which said plant is situated, pursuant to Article II of this contract, elect to become satisfied with the present lease to the said land now in force, and in such case the contractor agrees to give renewals of said lease from time to time as demanded by the Government in order to carry out the terms of this contract, and this instrument shall operate as renewals of said lease in case such deed is not given and in case such renewals are not otherwise given to the satisfaction of the Government.

Pursuant to this supplemental contract the Chemical Company, under date of April 10, 1919, deeded the land now in question to the United States. (R. 29, 30.)

SPECIFICATION OF ERRORS

The United States contends that the court below erred in the following particulars:

(1) In holding that title to the land in question was in the Iron Company and not in the United States. (Assignments II, VII, and VIII, R. 90, 91.)

(2) In holding that the United States had notice, actual or constructive, of the right of the Iron Company to demand a reconveyance of the land from the Chemical Company. (Assignments III, IV, and V, R. 90, 91.)

(3) In holding that the United States had no right, title, or interest in the land superior to the right, title, or interest of the Iron Company, except the right to remove the improvements and structures erected upon the land within a period of six months. (Assignments I and VI, R. 90, 91.)

SUMMARY OF ARGUMENT

I. Title to the land passed from the Iron Company to the Chemical Company, and from the Chemical Company to the United States, despite the fact that the Iron Company was erroneously described in its deeds as an Alabama corporation. If the true owner of lands conveys it by any name, the conveyance will transfer title, and parol evidence is admissible to identify the actual grantor. In this case there was not even a misnomer of the Iron Company, and the erroneous description of it was mere surplusage.

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II. The United States purchased the land for value without notice of the right of the Iron Company to demand a reconveyance of the land from the Chemical Company. That the United States paid value for the land is not questioned. The burden of proving that the United States had notice of the Iron Company's equitable claim is upon the Iron Company. The Iron Company has failed to sustain this burden. That the United States knew that the Chemical Company had a contract with the Iron Company for the supply of materials does not justify an inference that the United States had notice, or charge the United States with notice, of anything in that contract relating to the title to the land. There are no other facts in the record giving rise to an inference of notice, and the Iron Company has not alleged that the United States had any notice other than such as might be inferred from the recital in its contract with the Chemical Company.

III. The deed from the Chemical Company to the United States was in effect only a mortgage, which the contract between the Iron Company and the Chemical Company permitted to be placed on the land in priority to the right of the Iron Company to receive a reconveyance. The deed merely subjected the land to the contract of January 25, 1919, between the Chemical Company and the United States, which was an executory contract of sale by the United States to the Chemical Company. Under the Alabama law an executory contract of sale is the equivalent of a deed by the vendor and

a contemporaneous mortgage by the vendee to secure payment of any unpaid portion of the purchase money. While the United States may not be entitled under its bill, unless amended, to have the deed enforced as a mortgage, nevertheless if the deed was in reality a mortgage the courts below erred in granting the Iron Company affirmative relief on its counterclaim and in decreeing that the United States had no claim to or interest in the land. That the United States contended in the lower courts that it was the absolute owner of the land should not preclude it from here asserting a right less than absolute ownership.

ARGUMENT

I

TITLE TO THE LAND PASSED FROM THE IRON COMPANY TO THE CHEMICAL COMPANY, AND FROM THE CHEMICAL COMPANY TO THE UNITED STATES, DESPITE THE FACT THAT THE IRON COMPANY WAS ERRONEOUSLY DESCRIBED IN ITS DEEDS AS AN ALABAMA CORPORATION

All of the authorities agree that if the true owner of land conveys it by any name, the conveyance as between the grantor and grantee will transfer title. The question in such a case is whether the grantor intends to bind himself, and parol evidence is admissible to identify the actual grantor. (*Wakefield* v. *Brown,* 38 Minn. 361; *Precious Blood Society* v. *Elsythe,* 102 Tenn. 40; *Clement* v. *City of Lathrop,* 18 Fed. 885; *Douglas & Easton* v. *The Branch Bank*

at Mobile, 19 Ala. 659; *Fallon* v. *Kehoe,* 38 Cal. 44; *Emery* v. *Kipp,* 154 Cal. 83; *Hartman* v. *Thompson,* 104 Md. 389; *Thomas* v. *Wyatt,* 31 Mo. 188; *Rupert* v. *Penner,* 35 Neb. 587; *New York African Society* v. *Varick,* 13 Johns (N. Y.) 38; *David* v. *Williamsburgh, etc. Ins. Co.,* 83 N. Y. 265.)

In this case there was not even a misnomer of the Iron Company in its deeds. The grantor was named as "Shelby Iron Company," the correct corporate title. The deeds were executed and acknowledged by the "Shelby Iron Company." The president of the Iron Company signed them under authority of its board of directors and pursuant to the contract between the Iron Company and the Chemical Company. He had no authority to sign any such deeds in behalf of the Alabama Company. The Chemical Company went into possession under the deeds. The only irregularity in the deeds was that some attorney, who drew them, by mistake described the Iron Company as "incorporated under the laws of the State of Alabama." (R. 43, 44, 56.) We think it clear that this misdescription was mere surplusage and that the deeds passed legal title from the Iron Company to the Chemical Company.

The Alabama Company, it should be noted, had had no property since 1890, and no one had any idea that it had anything to do with the transactions with the Chemical Company. In *Peabody* v. *Brown,* 10 Gray (Mass.) 45, it was held that a deed to "Hiram Gowing, cordwainer," might be

shown by parol evidence of the previous negotiations between the parties to have been intended for "Hiram G. Gowing," who was a person of middle age, and not for "Hiram Gowing" his son, who was but thirteen years old.

II

THE UNITED STATES PURCHASED THE LAND FOR VALUE WITHOUT NOTICE, ACTUAL OR CONSTRUCTIVE OF THE RIGHT OF THE IRON COMPANY TO DEMAND A RECONVEYANCE OF THE LAND FROM THE CHEMICAL COMPANY

It is not questioned that the United States paid value for the conveyance to it of the land. The deed to it was made pursuant to the supplemental contract with the Chemical Company, dated January 25, 1919 (H. 59–64), which was to "provide for and constitute a full and final settlement of all rights and obligations, claims, and demands, of either party against the other, and of all questions under or growing out of" the prior contracts. The United States agreed upon a fixed sum to be paid the Chemical Company for the expenses and obligations it had incurred, surrendered its right to receive acetate of lime and methyl alcohol, and agreed to sell the land and plant to the Chemical Company for a fixed sum payable in installments instead of standing upon the provision of the contract of April 23, 1918, requiring the Chemical Company to purchase the plant at an appraised valuation. (R. 27–28.)

The burden of proving that the United States had notice of the Iron Company's equitable claim is upon the Iron Company

The question, then, is whether the United States had notice of the right of the Iron Company to demand a reconveyance of the land from the Chemical Company. As a preliminary to consideration of this question, it is essential to determine whether the Iron Company has the burden of proving that the United States had notice of the Iron Company's equitable right or the United States has the burden of proving lack of notice of such right. We believe that the weight of authority in the Federal courts, and probably also in the State courts, is to the effect that one seeking to set up a collateral equitable right against a holder of legal title has the burden of proving that the legal owner had notice of his equity. (See 27 Ruling Case Law, 718.)

Calais Steamboat Company v. *Van Pelt's Administrator,* 2 Black (67 U. S.) 372, seems conclusive of the question in this Court. In that case it was held that if the equitable owner of a thing has permitted another to hold the legal title accompanied by the usual documentary evidence of it, with possession, the burden of proof rests upon the equitable owner, in a contest with a purchaser for value, to show that the purchaser had notice of his equity in due time.

Gratz v. *Land & River Imp. Co.* (C. C. A. 7th Circuit), 82 Fed. 381, certiorari denied 173 U. S. 705, involved a contest between the holder of a deed prior in point of time but subsequent in point of

record, and the holder of a deed subsequent in date but prior of record. The position of a holder of a prior unrecorded deed is certainly at least as strong as that of one claiming merely an equitable right. On pages 385–386, the court said:

> It is further objected that the deed from Herbert to Mitchell, being prior in point of time, although subsequent in point of record, was effectual to pass the title of the premises, and was valid against the whole world, except bona fide purchasers for value, without notice, and that the burden of proof with respect to the bona fides of the deeds subsequent in date, but prior of record, is cast upon those claiming under them. This presents a question not altogether without difficulty, and in respect to which the authorities are not wholly at agreement. *Jackson* v. *M'Chesney,* 7 Cow. 360; *Wood* v. *Chapin,* 13 N. Y. 509; *Shotwell* v. *Harrison,* 22 Mich. 410; *Hoyt* v. *Jones,* 31 Wis. 389, 404; *Lampe* v. *Kennedy,* 56 Wis. 249, 14 N. W. 43; *Cutler* v. *James,* 64 Wis. 173, 179, 24 N. W. 874; *Prickett* v. *Muck,* 74 Wis. 199, 206, 42 N. W. 256. In the State of New York it is ruled that under the recording act the junior purchaser, whose deed is first recorded, is presumptively a bona fide purchaser for a valuable consideration, without notice, and that the burden of proof to the contrary rests upon the senior purchaser, whose deed has not been recorded. In Michigan it is held that the burden is upon him who claims by virtue of priority of record to show

affirmatively the payment of a valuable consideration, but that the burden is upon him claiming under a deed of prior date, but subsequent record, to show that such purchaser under the deed having priority of record had notice of the prior unrecorded deed. This ruling is founded upon the notion that, the payment of the purchase price being peculiarly within the knowledge of the grantee under the deed having priority of record, the law would not impose the burden of proving the negative fact upon the opposite party. In this case there was a very able and strong dissent by Campbell, C. J., to the effect that there is no ground for any such distinction, and that the burden rests upon the party claiming under the unrecorded deed. In *Hoyt* v. *Jones* the supreme court of Wisconsin for the first time considered the subject, and, in an able opinion by Chief Justice Dixon, concurred with the dissenting opinion of Chief Justice Campbell, and with the decisions of the state of New York, and held that the law would not presume fraud or bad faith on the part of the subsequent purchaser, and that the grantee under the unrecorded deed, being a party in the wrong, by omitting to record his deed, must assume the burden of showing a want of consideration or notice in the purchaser under the deed having a priority of record; and this, we think, is the better rule, because, as suggested by Chief Justice Campbell, any other doctrine would render the registry laws of very little value, especi-

ally in a case like the present, in which we are dealing with transactions of over 40 years ago.

The same rule has been applied in *White* v. *McGarry* (C. C. W. D. Mich.), 47 Fed. 420; *The Richard J. Carney* (C. C. A. 7th Cir.), 53 Fed. 927; *In re Ducker* (C. C. A. 6th Cir.), 134 Fed. 43; *Houston Oil Co. of Texas* v. *Goodrich* (C. C. A. 5th Cir.), 226 Fed. 434; certiorari granted, 241 U. S. 657, certiorari dismissed as improvidently granted, 245 U. S. 440; *Grogg* v. *Stevens* (C. C. A. 4th Cir.), 6 F. (2d) 862; *United States* v. *Wythe County Iron & Zinc Corporation* (D. C. W. D. Va.), 11 F. (2d) 971, 977; and *Gill* v. *Colton* (C. C. A. 4th Cir.), 12 F. (2d) 531; in most of which cases the courts apparently applied the law of the State in which the property was located. See also *Pickett* v. *Foster,* 149 U. S. 505, 523, 524. The contrary view appears to have been taken in *Keith Lumber Co.* v. *Houston Oil Co.* (C. C. A. 5th Cir.), 257 Fed. 1, certiorari denied, 250 U. S. 666, but this decision was based, in part at least, upon the peculiar provisions of the Texas recording act under consideration.

It may be, although we have found no direct authority, that the question is so far one of local law, depending upon the construction to be given the State recording acts, that the Federal courts should apply the law of the State where the property is situated. In *De Vaughn* v. *Hutchinson,* 165 U. S. 566, this Court said, on page 570:

> It is a principle firmly established that to the law of the State in which the land is

> situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances.

If the State law governs, there can be no question that the law of Alabama supports the rule for which we are here contending. In *Barton* v. *Barton,* 75 Ala. 400. 402, the court said:

> The rule as to proof of *bona fide* purchase is, that the party pleading it must first make satisfactory proof of purchase and payment. This is affirmative, defensive matter, in the nature of confession and avoidance, and the burden of proving it rests on him who asserts it. *Ei incumbit probatio, qui dicit.* This done, he need not go further, and prove he made such purchase and payment without notice. The burden here shifts, and if it be desired to avoid the effect of such purchase and payment, it must be met by counter proof, that, before the payment, the purchaser had actual or constructive notice of the equity or lien asserted, or, of some fact or circumstance, sufficient to put him on inquiry, which, if followed up, would discover the equity or encumbrance.

The same view was taken in *Center* v. *The P. & M. Bank,* 22 Ala. 743; *Bartlett* v. *Varner's Executor,* 56 Ala. 580; *Hodges* v. *Winston,* 94 Ala. 576; *Coskrey* v. *Smith,* 126 Ala. 120; *Scotch Lumber Co.* v. *Sage,* 132 Ala. 598; *Ely* v. *Pace,* 139 Ala. 293; *Arnett* v. *Handley,* 185 Ala. 119; and *Holly* v. *Dinkins,* 202 Ala. 477.

Even if the Federal courts are not absolutely bound to apply the Alabama law, it would seem that in the absence of a clearly established Federal rule to the contrary, the Alabama law should be very persuasive. The property is located in Alabama and the case was tried in that State, and it is a fair assumption that the parties have acted throughout with reference to the law of Alabama.

There is nothing inconsistent in *Wright-Blodgett Co.* v. *United States,* 236 U. S. 397, and other similar cases. In that case the United States brought suit to annul certain land patents on the ground that the entrymen had defrauded the United States in securing the patents. The Court held that while *bona fide* purchase for value would be a perfect defense if established by grantees of the entrymen, the burden was upon them to prove purchase for value and lack of notice.

In such cases the fraud or equity which is alleged to defeat the legal title arises in the direct line by which the legal title has descended; the owner of the legal title has derived his title through the fraud. The underlying reason for the rule that the burden of showing that he is a *bona fide* purchaser for value is on the owner of the legal title in such cases, is well stated in *Seymour* v. *McKinstry,* 106 N. Y. 230, 240, as follows:

> The reason for this rule may be the same ascribed to the doctrine which requires the holder of a note, shown to have been fraud-

> ulently obtained, to prove under what circumstances and for what value he became the holder, viz.: That when there is fraud the presumption is that he who is guilty will part with the instrument for the purpose of enabling some third person to recover upon it, and such presumption operates against the holder and it devolves upon him to show affirmatively the facts essential to overcome that presumption and relieve himself from its effect.

Obviously this reason is wholly inapplicable in a case, like the present, where a mere collateral equity is asserted to defeat a legal title which is not tainted by fraud. In this case the Iron Company itself, uninfluenced by fraud, conveyed the title to the Chemical Company and attempted by an unrecorded contract [1] to reserve a right to a reconveyance. The Chemical Company conveyed the title to the United States subject to an executory contract for its repurchase, which, if carried out, would have permitted compliance with the Chemical Company's obligation to the Iron Company. Title was therefore properly vested in the United States, and the Iron Company is seeking to defeat that title by asserting an equitable right based upon an

[1] There is no testimony as to whether or not the contract between the Iron Company and the Chemical Company was recorded. It may fairly be assumed, however, that it was not, because all of the deeds placed in evidence show recording (R. 31, 33, 34, 35), while the contract does not. In addition, both of the lower courts evidently treated the contract as unrecorded.

unrecorded instrument which was not a part of the chain of title. Under these circumstances the Iron Company, whose failure to make its rights a matter of record has caused the present conflict, should have the burden of showing that the United States received the actual notice which would make the lack of recording immaterial.

The distinction between cases where there is fraud in the direct line by which legal title passes, and cases where a collateral equitable claim is asserted is similar to that pointed out by this Court with respect to negotiable instruments in *Pana* v. *Bowler,* 107 U. S. 529, 541, 542, as follows:

> It is a general rule that when the holder of a negotiable instrument, regular on its face and payable to bearer, produces it in a suit to recover its contents, and the same has been received in evidence, there is a *prima facie* presumption that he became the holder of it, for value at its date, in the usual course of business. * * *
>
> * * * The exception relied on by the plaintiff in error is well settled, and is this: if, in a suit brought by the indorsee or transferee of a negotiable instrument, the maker or acceptor, or any party who is primarily bound by the original consideration, proves that there was fraud or illegality in the inception of the instrument, the burden of proof is thrown on the plaintiff to show that he is a holder for value.

While it is no doubt true that the general rule stated above with respect to negotiable instruments

is partly based upon the desire of the courts to permit such instruments to circulate as freely as possible, it would seem that similar considerations should apply for the protection of record titles to real estate against unrecorded equitable claims.

The Iron Company has failed to sustain the burden of proving that the United States had notice of its equitable right

Both lower courts decided that the United States had actual notice of the Iron Company's right, basing this decision upon the recital of the original contract between the United States and the Chemical Company which stated that the Chemical Company had a contract with the Iron Company whereby it was to receive a supply of wood, and the argument that it was inconceivable that the United States would have agreed to finance the Chemical Company unless it knew the terms of the contract between the Iron Company and the Chemical Company.

It is, of course, well settled that ordinarily this Court will not reverse the concurring decisions of two lower courts upon a question of fact, but it is equally well settled that it may do so in an equity case where there is a clear preponderance of evidence against their conclusions. (*The Lady Pike,* 21 Wall. 1, 8; *The Iroquois,* 194 U. S. 240, 247; *United States* v. *Stinson,* 197 U. S. 200, 207; *United States* v. *Clark,* 200 U. S. 601, 608.) We believe that in this case the evidence so clearly fails to sus-

tain the finding of the lower courts as to justify fully a reversal by this Court of their finding. The finding is not based on any testimony and it can not be argued that the trial court had the advantage of observing witnesses; it is based upon a mere inference from a written document, and we think it can be demonstrated that the inference was not justified.

The Circuit Court of Appeals, in addition to finding that the United States had actual notice, held that the facts were sufficient to impute notice to it. As the same facts were relied on for each holding, the question seems to be the same in each case, whether the information possessed by the United States was sufficient to cause it to investigate, and the same argument is equally applicable to show that actual notice was not proven and that notice should not be imputed to the United States.

All of the authorities which we have been able to find negative the proposition that notice of a contract for the supply of materials justifies an inference of notice of anything in that contract which does not relate to the supply of materials. There is no evidence in the record to show what importance the United States attached to the contractual obligation of the Iron Company to supply the Chemical Company with wood, except the testimony of Mr. Bush, President of the Iron Company that he was told by the president of the Chemical Company that the United States would not make a contract with

the Chemical Company until the latter had made a contract with someone for a supply of wood and other facilities. (R. 45.)

This is clearly of no value as evidence of the real attitude of the United States. It may be that wood was plentiful in the vicinity of Shelby and that the United States thought it unnecessary to look into the contract between the Chemical Company and the Iron Company because it believed that if an adequate supply of wood was not forthcoming thereunder other arrangements for such a supply might easily be made. It may be that as the United States had sufficient confidence in the Chemical Company to agree to erect a $400,000 plant for it to operate, it thought it could rely on the Chemical Company to procure a supply of wood and need not investigate the matter. It is certainly true that the original contract with the Chemical Company was made during the war when contracts were made hastily, by agents of the United States with little experience in such matters, and without the investigation which might be made at other times. Any of these things, and perhaps many others, might explain and justify a failure by the United States to examine the contract between the Iron Company and the Chemical Company.

In 20 Ruling Case Law, 346, 349, 350, the rule is stated as follows:

> Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowl-

> edge are at hand; and if he omits to inquire he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. * * *
>
> No general rule can be laid down by which to determine what facts are sufficient to excite inquiry; each case must to a great extent be decided on its own facts. * * *
>
> * * * To charge one with notice, however, the facts must be such as ordinarily to excite inquiry with reference to the particular fact which the inquiry is designed to elicit.

The proposition stated in the last sentence of the above quotation is supported by the following cases: ***Rogers*** v. ***Rawlings*** (C. of A., D. C.), 298 Fed. 683; ***Mueller, etc.,*** v. ***Engeln, etc.,*** 75 Ky. 441; *Anderson* v. ***Blood,*** 152 N. Y. 285. See also 2 Pomeroy's Equity Jurisprudence (4th Ed.), Section 629, p. 1208 *et seq.*

In *United States* v. *Detroit Lumber Co.,* 200 U. S. 321, a suit to annul land patents on the ground that they had been obtained by fraud on the part of the defendant's grantor, it was claimed that the defendant was not a *bona fide* purchaser because notice of the fraud might have been obtained from account books of the grantor which had been turned over to the defendant. The Court, overruling this contention, said (p. 332):

> No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circum-

> stances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith. *Jones* v. *Simpson,* 116 U. S. 609, 615. He is not bound to make a searching examination of all the account books of the vendor nor to hunt for something to cast a suspicion upon the integrity of the title.

It is settled law that the recording of an instrument which is ineligible for record under the recording acts has no effect as notice to subsequent purchasers. (*Lewis* v. *Barnhart,* 145 U. S. 56, 76–79; *Lynch* v. *Murphy,* 161 U. S. 247, 253, 254.) Yet if the theory of the lower courts in this case be sound, such recording would in every case justify an inference of notice, for surely it is no more inconceivable that the United States did not examine the contract between the Iron Company and the Chemical Company than that anyone should purchase real property without examining the records affecting the title.

We think there can be no doubt that the sound rule is that one is charged with notice, or can be inferred to have notice, only of such things as reasonably appear from the information in his possession to be discoverable by investigation; and that information that a contract for supplies exists can not be treated as a basis for notice of a claim against land.

No other facts giving rise to an inference of notice appear in the record, and the Iron Company has not alleged that the United States had any notice other than such as might be inferred from the recital in its contract with the Chemical Company. Mr. Bush testified that the plant built by the United States under the contract with the Chemical Company should be operated in connection with the Iron Company's plant (R. 41, 42, 46, 47), but it is manifest that in so testifying he was thinking of the period in 1922 and 1923 when the Iron Company wanted to buy the plant.

There is no evidence that the parties thought when the plant was built and the land acquired by the United States that the plant could not be operated separately from the Iron Company's plant, and the fact that the Iron Company had deeded the land to the Chemical Company, an entirely independent corporation, would have negatived any inference of ownership on the part of the Iron Company which the United States might have drawn from the physical location of the land.

No inference against the United States can fairly be drawn from the failure of the officer who made the contract of April 23, 1918, between the Chemical Company and the United States, to testify. Only a small percentage of those who were officers of the army during the War are still in the service. There is nothing in the record to show the present whereabouts of the officer in question or whether he could have been obtained as a wit-

ness. In addition, it is entirely possible that if he had been subpœnaed as a witness he would have had no recollection of the circumstances surrounding the making of the contract. During the War contracts were made hastily and in great numbers, and it is doubtful whether any officer charged with the making of contracts for war materials could now remember the circumstances surrounding more than a small proportion of the contracts negotiated by him.

Nor can any inference that the United States had notice of the contract between the Iron Company and the Chemical Company be drawn from the fact that the contract of April 23, 1918, between the Chemical Company and the United States, contemplated the surrender of the land and the removal of the plant by the United States at the termination of the War. It is clear that at the time the contract was made the United States was interested almost exclusively in obtaining material for use in the War. It is apparent from the contract that at that time it was a matter of no concern to the United States what happened to the land after the termination of the War. Under these circumstances the United States naturally would not be interested in the motives of the Chemical Company in desiring the land to be returned to it when the War ended. Therefore, it can not be inferred that the United States knew that the Chemical Company wanted the land returned to it at the end of the War in order that it might reconvey the land to the Iron Company.

III

THE DEED FROM THE CHEMICAL COMPANY TO THE UNITED STATES WAS IN EFFECT ONLY A MORTGAGE, WHICH THE CONTRACT BETWEEN THE IRON COMPANY AND THE CHEMICAL COMPANY PERMITTED TO BE PLACED ON THE LAND IN PRIORITY TO THE RIGHT OF THE IRON COMPANY TO RECEIVE A RECONVEYANCE

Paragraph Eighth of the contract between the Iron Company and the Chemical Company, which provided for the reconveyance of the land to the Iron Company, provided that at the time of such reconveyance the land should be—

> free and clear of any encumbrances or liens whatsoever, or if there is any mortgage or there are any mortgages on the same not yet due, the Chemical Company shall pay over to the Iron Company the amount thereof or the amount of any bonds outstanding thereunder, with any accrued interest thereon. (R. 17.)

Clearly, therefore, the parties contemplated that the Chemical Company might mortgage the land, and that if it did so the land might be reconveyed to the Iron Company subject to such mortgage or mortgages. The Iron Company was content to look to the Chemical Company for payment of an amount sufficient to protect it against any such mortgage or mortgages. The parties no doubt contemplated that the Chemical Company might have to mortgage the land in order to erect or acquire

its plant, and the Iron Company consented that the Chemical Company might do this.

While the deed from the Chemical Company to the United States was absolute in form, the Court may, of course, look beyond the terms of the instrument to the real transaction. In *Peugh* v. *Davis,* 96 U. S. 332, this Court said, at page 336:

> It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. * * *
>
> It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has, in a court of equity, a right to redeem the property upon payment of the loan. This right can not be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates.

In *Robinson* v. *Farrelly,* 16 Ala. 472, the court said (p. 476):

> The rule is unquestionably settled, that if the transaction was intended as a mere security for a debt, whatever may be the form of the instrument, it must in a court

> of equity be considered a mortgage. * * *
>
> It is equally true, that if the parties intended, at the time the instrument was executed, that it should be a security for a sum of money, due by the vendor to the vendee, no words used in the instrument can cause it afterwards to operate as a sale, and not as a mortgage; for if the transaction in its inception was a mortgage, a court of equity can not permit it to be converted into an absolute purchase by a mere default in the payment of the mortgage money at the appointed time. The rule is, once a mortgage, always a mortgage.

The deed from the Chemical Company to the United States was made pursuant to the contract of January 25, 1919. The Chemical Company never surrendered possession of the land, and contemporaneously with the conveyance of the land it became subject to all the terms and conditions of the contract. The sole effect of the deed was to subject the land, as well as the plant which already belonged to the United States, to the terms of the contract. The true nature of the transaction between the parties, therefore, depends upon the effect of the contract.

While the contract purported to provide for a lease to the Chemical Company by the United States until the Chemical Company had fully paid for the plant, and thereafter a sale and conveyance to the Chemical Company by the United States, it seems clear that the transaction was in effect merely

an executory contract of sale with the purchase price payable in installments, and that there was no real lease. The contract stated that the fair commercial value of the plant was not in excess of $260,000. It provided that the Chemical Company should pay at once $50,000, and should pay $50,000 in one year, $75,000 in two years, and $85,000 in three years, all of which sums should apply as rental for the property during that period. At the end of three years the United States was to sell and convey the property to the Chemical Company for a consideration of $1.00. The sum of the so-called rentals, therefore, all payable within three years, was the exact amount fixed as the fair commercial value of the plant. Clearly the amounts payable were fixed with reference to the sale value and not the rental value of the property. This is further indicated by the fact that the Chemical Company might at any time prior to the expiration of the three years obtain a conveyance of the property by paying a sum equal to the difference between $260,000 and the total sum of all rents previously paid by the Chemical Company. It is also to be noted that the sum of the so-called rentals was the fair commercial value of the plant alone, nothing being added for the value of the land.

It is beyond question that under the Alabama law an executory contract of sale is the equivalent of a deed by the vendor and a contemporaneous mortgage by the vendee to secure payment of any unpaid portion of the purchase money. In *Lowery*

v. *Peterson,* 75 Ala. 109, 111, which was a bill by an assignee of the unpaid balance of purchase money against the vendor and the vendees for the purpose of having declared and enforced a lien on the land for the payment of the amount of the purchase money claimed by him, the court said:

> When, as in the present case, a vendor of lands retains in himself the legal title, covenanting or agreeing to convey it at a future day, upon condition that the vendee makes payment of the purchase money, he carves out his own security, which is in the nature of a mortgage, and to which all the essential incidents of a mortgage attach. The relation of the parties is analogous to, if not precisely, that which would have been created, if the vendor had made a conveyance of the legal estate, and, contemporaneously, the vendee had executed a mortgage to secure the payment of the purchase money. For, as has been justly observed, there can not be a sensible distinction drawn between the case of a legal title conveyed to secure the payment of a debt, and a legal title retained to secure payment.

In *Moses Brothers* v. *Johnson,* 88 Ala. 517, in which a vendee in possession was enjoined from cutting timber on the land and thereby impairing or endangering the vendor's security, the court said, on page 520:

> When a vendor of real estate enters into an executory agreement to convey title on the

> payment of the purchase money, he sustains, in substance, the same relation to the vendee, as a mortgagee does to a mortgagor. Each has a legal title, which, in the absence of stipulations for possession, will maintain an action of ejectment. Each can retain his legal title against the other party until the purchase money, or mortgage debt, is paid, unless he permits the other to remain in undisturbed possession for twenty years. And yet each is at last but a trustee of the legal title for the mortgagee [mortgagor] or vendee, if the purchase money or mortgage debt, as the case may be, is paid or seasonably tendered. The same mutual rights and remedies, legal and equitable, and the same limitation to the right of recovery, obtain in the one relation and in the other.

In *Loventhal* v. *Home Insurance Co.*, 112 Ala. 108, it appeared that Mrs. Loventhal was a vendee in possession under an executory contract to purchase. She sought to recover on a fire insurance policy which provided that it should be void if the interest of the insured were other than unconditional and sole ownership, or if the subject of insurance were a building on ground not owned by the insured in fee simple. On page 114 the court, after referring to a number of cases dealing with the relation of vendor to vendee, said:

> In view of these unassailable principles, we must regard Mrs. Loventhal as owner of

the property; and just such an owner as she would have been, if her vendor had conveyed to her, by deed, the entire, absolute and unconditional estate therein, in fee simple, and she had reconveyed it to him, by way of mortgage, to secure payment of the purchase money. Then the simple question is, was that interest, so held by her, unconditional and sole ownership; or was the ground owned by her "in fee simple," within the meaning of the policy?

In *Love* v. *Butler,* 129 Ala. 531, 537–538, the court said:

> It is clear from the principles announced in the cases cited above, that the reservation of the legal estate by the vendor, as a security for his debt, is in equity nothing more than an equitable mortgage * * *. After the law day of the mortgage, the mortgagee is clothed with the legal title, with an immediate right to the possession. So in the case of vendor and purchaser, under a contract such as is disclosed in this case, the vendor has the legal title and upon a breach of a condition of the bond by the purchaser is entitled to the possession. Should he take possession, there can be no doubt but that the purchaser has the right to redeem the lands, just as a mortgagor would have in case the mortgagee takes possession.

Other cases applying the same rule are:

Conner v. *Banks,* 18 Ala. 42;
Kelly v. *Payne,* 18 Ala. 371;

Relfe v. *Relfe,* 34 Ala. 500;
Bankhead v. *Owen,* 60 Ala. 457, 466;
Wolffe v. *Nall,* 62 Ala. 24;
Chapman v. *Lee,* 64 Ala. 483;
Walker v. *Crawford,* 70 Ala. 567;
Janney & Cheney, Trustees, v. *Habbeler,* 101 Ala. 577;
Hester v. *Hunnicutt,* 104 Ala. 282.

In *Hardin* v. *Boyd,* 113 U. S. 756, 765, this Court applied the Arkansas law that the vendor, under an executory contract of sale, occupies the position of a mortgagee, because "the legal effect of a title bond is like a deed executed by the vendor and a mortgage back by the vendee."

It is no doubt true that the United States is not entitled under its bill to a decree for the balance of the purchase money due under its contract with the Chemical Company, and to enforce a lien on the property for the payment thereof, although the bill might properly have been amended to pray for such relief. (*Hardin* v. *Boyd, supra.*) But in this case the trial court not only denied the prayer of the bill, but also granted the prayer of the Iron Company's counterclaim and decreed that as between the United States and the Iron Company the title to the land was in the Iron Company and the United States had no claim to or interest in the land.

If, as we think we have established above, the United States is in the position of a mortgagee

with title to, or a right in, the land to secure payment of the unpaid portion of the purchase money under the contract of sale to the Chemical Company, then the courts below were in error with respect to so much of the decree as granted affirmative relief to the Iron Company.

It may be contended that it was not argued in the lower courts that the deed from the Chemical Company to the United States was in effect a mortgage, and therefore that the question can not be raised in this Court. In the lower courts the Iron Company and the United States each contended that it was absolute owner of the land. This claim on behalf of the United States may have been too broad, but that should not preclude it from here asserting a right less than absolute ownership. That the deed was in effect a mortgage is a necessary legal conclusion from the papers put in evidence and before the courts for construction. The Iron Company undoubtedly put in evidence everything tending to support its claim of absolute title and has not been prejudiced. In *Watts* v. *Waddle,* 6 Pet. 389, a suit by a vendor for specific performance, this Court held that the complainant was not entitled to the relief asked in the bill, but was entitled to a decree for the rents and profits of the land while it had been in the possession of the vendee, although such relief had not been asked in the court below.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed.

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JANUARY, 1927.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 123.

UNITED STATES OF AMERICA, Appellant,

vs.

SHELBY IRON COMPANY, a Corporation, Organized and Existing under the Laws of New Jersey, and SHELBY IRON COMPANY, a Corporation, Organized and Existing under the Laws of Alabama, Appellees.

BRIEF AND ARGUMENT FOR APPELLEES.

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IN THE

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SHELBY IRON COMPANY, A CORPORATION ORGANIZED UNDER THE LAWS OF NEW JERSEY, AND SHELBY IRON COMPANY, A CORPORATION ORGANIZED UNDER THE LAWS OF ALABAMA, APPELLEES.

BRIEF AND ARGUMENT FOR APPELLEES.

Statement.

Attorneys for the appellees deem it necessary to make a statement of the case for the reason that they have not received a copy of the brief for the appellant. For the same reason they are assuming that the

points to be relied on by appellant will be the same as those urged in the District Court and in the Court of Appeals.

The bill was filed to quiet title under the provisions of the Alabama Statute. Sections 9905 to 9908, inclusive, of the Code of Alabama of 1923, which were the same as those in force when the bill was filed, are as follows:

> "9905. *Person in possession of and claiming lands may file bill to clear title.*—When any person is in peaceable possession of lands, whether actual or constructive, claiming to own the same, in his own right or as personal representative or guardian, and his title thereto, or any part thereof, is denied or disputed, or any other person claims or is reputed to own the same, or any part thereof, or any interest therein, or to hold any lien or encumbrance thereon, and no suit is pending to enforce or test the validity of such title, claim or encumbrance, such person or his personal representative or guardian, so in possession, may bring and maintain a suit in equity to settle the title to such lands, and to clear up all doubts or disputes concerning the same.
>
> "9906. *Contents of Bill.*—The bill must describe the lands with certainty, must allege the possession and ownership of the complainant, and that the defendant claims or is reputed to claim some right, title, or interest in or incumbrance upon such lands, and must call upon him to set forth and specify his title, claim, interest, or incumbrance, and how and by what instrument the same is derived and created.

"9907. *Contents of Answer.*—If the defendant shall answer claiming any estate or interest in, or incumbrance upon such lands, he must, in such answer specify and set forth the title, claim, interest, or incumbrance so claimed, and if not claimed in or upon the whole of the lands, he must specify and describe with sufficient certainty, the part in or upon which the same is claimed, and the manner in which, and the sources through which such title, claim, interest, or incumbrance is claimed to be derived and created.

"9908. *Jury Trial on Demand; Decree.*—Upon the application of either party, a trial by jury shall be directed to determine the issues or any specified issue of fact presented by the pleadings; and the court is bound by the results, but may, for sufficient reasons, order a new trial thereof; and when such trial is not requested, or as to the facts for which the same is not requested, the court shall consider and determine such title, claim, interest, or incumbrance, and shall, upon the finding of the jury, or upon such consideration and determination, finally adjudge and decree whether the defendant has any right, title or interest in, or incumbrance upon, such lands, or any part thereof, and what such right, title, interest, or incumbrance is, and in or upon what part of the lands, the same exists; and such decree is binding and conclusive upon all the parties to the suit."

It was averred in the bill (Tr., pp. 1-3) that on the eleventh day of June, 1918, the Shelby Iron Company, a corporation of New Jersey, was seized and possessed

of the lands described in the bill; "that on the eleventh day of June, 1918, and June 17th, 1918, a certain deed or conveyance of all of the right, title or interest of the said Shelby Iron Company of New Jersey" in and to said lands was made and delivered to the Shelby Chemical Company, and that on the 10th day of April, 1919, the Shelby Chemical Company conveyed all of its right, title and interest in such lands to the United States of America; that the United States of America, the Complainant, had been in possession of the lands since the 23rd day of December, 1922, and that Complainant's title to the land was denied or disputed by defendants who were claiming some right or title or interest therein; that no suit was pending to test the validity of such claim, and there was a prayer for a decree that defendants had no right, title or interest in the lands. Shelby Iron Company, a corporation under the laws of New Jersey, and Shelby Iron Company, a corporation under the laws of Alabama, were made parties defendant.

The New Jersey Company answered and admitted that it was seized and possessed of the land as averred in the bill but denied that it had conveyed the same to the Shelby Chemical Company as averred in the bill. The answer stated on information and belief that on the 11th day of June, 1918, the Shelby Iron Company of Alabama conveyed to the Shelby Chemical Company a part of the real estate described in the bill and that on the 17th day of June, 1918, the said Iron Company of Alabama conveyed another portion of said real estate, but that the description of the lands in the

bill was inaccurate and did not correspond with the description in the deeds. It further averred that at the time of the making of said conveyances the Iron Company of Alabama had no title to or interest in said real estate and that by said deeds the Shelby Chemical Company acquired no title to the same and hence had no title to convey to the complainant; that defendant denied and disputed the title of complainant; that on the 1st day of October, 1890, the Iron Company of Alabama being the owner of the real estate described in the bill conveyed the same to the Alabama Coal and Iron Company, a corporation organized under the laws of the State of New Jersey, the name of which was subsequently changed to Shelby Iron Company; that defendant went into possession of said real estate under said deed and had never parted with the title to same. (Tr., pp. 3-5.) The Iron Company of Alabama in its answer disclaimed any interest in the lands and denied that it was disputing the title of the plaintiff thereto but averred that on the 11th day of June, 1918, and the 17th day of June, 1918, defendant made conveyances to the Shelby Chemical Company of the real estate described in the bill and that the bill did not accurately describe the lands so conveyed; that defendant on the 1st day of October, 1890, had conveyed all of said real estate to the Alabama Coal and Iron Company and since that time defendant had had no title to or interest in or claim upon the same.

After the filing of these answers, complainant amended its bill by making the following averment: "That on the eleventh day of June, 1918, and June 17,

1918, a certain deed or conveyance of all of the right, title, or interest to said lands mentioned in the first paragraph of the bill so made and delivered to the Shelby Chemical Company, a corporation organized under the laws of the State of Delaware, that in said conveyance, it was the true intention of the parties to convey all of right, title and interest of the Shelby Iron Company, a corporation of New Jersey, but that through mistake, or fraud, or inadvertence, said conveyance was made and executed from the Shelby Iron Company, a corporation of Alabama." The prayer of the bill was amended by asking for a reformation of the deed so as to show that it was "a conveyance by the Shelby Iron Company, a corporation of New Jersey, as was the true intent of the parties at the time the said conveyance was made by the Shelby Iron Company, a corporation of Alabama." (Tr., pp. 6-7.)

Answering the bill as amended, the New Jersey Company denied that complainant was entitled to the reformation of the deeds asked for for the following reasons: Prior to the 8th day of April, 1918, negotiations were had between the Shelby Chemical Company and defendant, which resulted in the execution of a contract between them in and by which it was recited that the Shelby Chemical Company was desirous of erecting a chemical wood distillation plant contiguous to the iron furnaces of defendant and that the charcoal produced in said plant would be delivered to defendant for use in its said furnaces; that defendant would deliver hard wood for the operation of such plant and furnish steam and water therefor and pay certain

prices for the charcoal; that defendant was to convey to the Chemical Company sufficient ground on which to erect the distillation plant. It is further recited that since the United States Government would be financially interested in the construction of the plant, such real estate might be "deeded to and vested in the United States Government during the period of a contract made between the Chemical Company and the United States Government, said contract to extend for the duration of the war"; that the contract between defendant and the Chemical Company should extend until April 1, 1923, with the right upon the part of defendant to extend it for a period of five years, and that on the termination of the contract the Chemical Company should reconvey to defendant all of the lands which were to be conveyed to it by defendant without cost to defendant and free and clear of any incumbrance or liens whatsoever, and that the Chemical Company would sell to defendant all of the improvements, equipment and other property placed on the lands by the Chemical Company; that it was further recited in said contract that the Chemical Company was about to construct such distillation plant under a contract with the United States Government by the terms of which it was to become the owner of the land, buildings, equipment and improvements, if an enabling statute to that effect should be passed by the Congress of the United States, and that the provision as to the reconveyance of the lands was subject to the obtaining of the title to said lands by the Chemical Company from the United States Government; that

the only consideration moving to the defendant for the execution of said contract on its part was the agreement on the part of the Chemical Company to deliver charcoal to the defendant for the operation of its furnaces by reason of which defendant would be able to discontinue and did discontinue and dismantle part of its then existing plant for the production of charcoal, and also the option given to defendant to purchase the plant at the termination of the contract; that shortly after the execution of the contract between defendant and the Chemical Company a contract was made between the Chemical Company and complainant in and by which it was recited that the Chemical Company had a contract "with the Shelby Iron Company of Shelby County, Alabama, according to the term of which the Shelby Chemical Company shall receive all the lumber it may require from the timber lands owned and leased by the Shelby Iron Company in return for all charcoal derived therefrom"; that the Chemical Company had offered to undertake the operation of the plant for the production of acetate of lime and methyl alcohol, provided the complainant would assume the expense of erecting the plant; that the Chemical Company would either convey or lease to the complainant a tract of land at Shelby, Alabama, for the erection of said plant; that said conveyance should be made subject to the opinion by the Attorney-General that the Government would derive an absolute title to said premises, and that the Government would have the right to expend money for the erection of improvements thereon; that the Chemical Company should proceed at once to erect

the plant which was to be paid for by complainant and used and occupied by the Chemical Company; that the entire output of the plant of lime and alcohol would be sold to complainant for the period not exceeding approximately eighteen months from the date of the contract and thereafter for the duration of the war; that on the repayment to the complainant of the cost of the plant, it would sell to the Chemical Company the plant and equipment, if it had the legal authority to do so, and that in case the complainant should take over said plant or undertake to operate it, its right to so operate it should, except as might be expressly provided by statute, cease and terminate at the end of the then existing war, and that if at that time the sale of the plant to the Chemical Company should have been consummated, the complainant would surrender possession to the Chemical Company, but that if at the termination of the war the plant was still owned by complainant, it should at its own expense within six months from the end of the war remove all buildings and equipment constituting such plant from the ground upon which the same was erected and should without further consideration reconvey such land to the Chemical Company; that a tentative draft of such contract between complainant and the Chemical Company was submitted to defendant before the execution of the contract between defendant and the Chemical Company, and that at the instance and insistence of defendant there was embodied in the said contract between complainant and the Chemical Company the stipulation requiring complainant to remove all buildings and equip-

ment constituting the plant within six months from the end of the war and to reconvey such land to the Chemical Company, if at the termination of the war the plant was still owned by complainant; that the war ended before said plant was finally completed during the year 1919, and that thereafter the plant was operated by the Chemical Company and the charcoal produced was delivered to defendant until about the 31st day of March, 1922, when the Chemical Company ceased to operate the plant which had ever since remained idle, whereby defendant had been subjected to great loss and inconvenience on account of the failure to receive such charcoal; that by reason of the fact that it had discontinued and removed a part of its former plant for the production of charcoal, and that because of the failure of the Chemical Company to manufacture and deliver charcoal to defendant, it had been unable to operate its furnaces at their full capacity and had thereby been subjected to great loss and damage; that at the time of the conveyance of the Chemical Company to complainant of the real estate, said Chemical Company did not have the legal title to the same, although three several deeds had been made, two by the Shelby Iron Company of Alabama and one by the Shelby Iron Company, without describing it as being either the New Jersey or Alabama Corporation, the property conveyed in the last named deed not being described in the bill; that although it was expressly provided in the contract between the complainant and the Chemical Company that complainant should at its own expense within six months after the end of the

war remove all buildings and equipment constituting such plant from the ground upon which the same was located and reconvey the ground to the Chemical Company, complainant had not removed said buildings and equipment; that on the 23rd day of December, 1922, the Chemical Company had surrendered possession of the plant to complainant, who had never attempted to operate the plant, and that on the 19th day of January, 1923, the Chemical Company was adjudicated a bankrupt; that the consideration moving to the defendant for the execution of such agreement with the Chemical Company had wholly failed; that the Chemical Company had disabled itself from carrying out the contract and making delivery of charcoal to defendant; that complainant had no authority to operate the plant, and that it would be inequitable to require defendant to convey the real estate to the plaintiff; that defendant had offered to purchase the plant from complainant at a fair and reasonable valuation, but that complainant had refused to allow defendant to purchase the plant and had likewise refused to remove the plant from the property of defendant; that by reason of the location of the plant in immediate proximity to the furnace plant of defendant, and that by reason of the fact that the chemical plant and furnace plant were closely intertwined and interlocked in construction, the chemical plant could not be operated by any third party without great loss and risk to defendant. It was further averred that the deed from the Chemical Company to complainant was a cloud on the title of defendant which ought to be removed, and

that defendant had no adequate remedy at law; that defendant offered to do equity by purchasing the plant from the plaintiff at its fair and reasonable value or by allowing plaintiff to remove said plant from the premises of defendant within a reasonable time to be fixed by the court and to do and perform whatever else it ought to do to entitle it to the relief thereafter prayed. It was prayed that the answer might be treated as a counter-claim, and that it might be ordered and decreed by the court that the deed from the Chemical Company to complainant should be cancelled as a cloud on defendant's title; that the possession of the premises should be delivered up by complainant to defendant within such time and on such equitable terms as might be fixed by the court; that the contract between the Chemical Company and defendant should be declared of no further force and effect and there was a prayer for general relief. This answer, which makes as exhibits thereto the contracts referred to and the deeds, is found on pages 7 to 36 of the transcript.

Complainant filed a replication to this answer in which it was averred that it was the true intent and purpose of the Shelby Iron Company of New Jersey "when said deed was executed" to convey all of its right, title and interest to the property described in the original bill. (Tr., p. 36.)

The Testimony.

On the trial of the case it was admitted between the plaintiff and defendant that the exhibits annexed to the answer to the amended bill were true and cor-

rect copies of the originals; that the said contracts between the Shelby Iron Company and the Shelby Chemical Company and between the Shelby Chemical Company and the United States of America were duly and properly executed; that the deeds annexed as exhibits were duly executed, and that as to all of the deeds made by the Shelby Iron Company it was the true intention and purpose of the parties to make the same on and in behalf of the Shelby Iron Company of New Jersey. (Tr., p. 37.) M. W. Bush testified in open court that he was the President of the Shelby Iron Company of New Jersey as well as of the Shelby Iron Company of Alabama; that at the time of the execution of the contract between the Shelby Iron Company of New Jersey and the Shelby Chemical Company, the Shelby Iron Company of New Jersey was engaged in the manufacture of charcoal iron at Shelby, Alabama, and that charcoal was the fuel used for smelting ore; that it was represented to him by the Shelby Chemical Company that the manufacture of charcoal by its distillation process would produce more charcoal and would be stronger and delivered dry; that before the execution of the contract by his company and the Chemical Company, the proposed contract between the Shelby Chemical Company and the United States of America, or the principal points of the same, were submitted to him and that he insisted on others being added; that at his instance and request there was inserted in the contract the stipulation requiring the plaintiff to remove all buildings and equipment constituting the chemical

plant within six months from the end of the war and to reconvey the land to the Shelby Chemical Company, if at the end of the war the plant was still owned by the Government; that this was before the execution of the contract between the Chemical Company and the Iron Company or the execution of any contract; that after the execution of the contract between the Chemical Company and the Iron Company, the latter dismantled part of its then existing plant and cancelled certain arrangements it then had for getting charcoal; that the Iron Company complied with its contract with the Chemical Company in every particular, going to the expense of nearly fifty thousand dollars to enable it to do so; that before executing any of the deeds a copy of the contract between the Chemical Company and the United States was furnished the Iron Company; that the chemical plant was not quite complete at the end of the war but was finally completed and that the delay in the completion thereafter was caused by the holding up of the work by the Government for several months, it having been finally completed in the latter part of 1919. After the completion, charcoal was produced by the plant and delivered to the defendant continuously until the plant ceased to be operated about the middle of March, 1922. After that time, the plant remained idle and because of the fact that the plant furnished no charcoal, the defendant had had to operate its plant on one-half time, resulting in a very heavy loss; that defendant knew nothing of the surrender of possession of the plant by the Chemical Company to the Government until after it had been

surrendered on the 22d or 23d day of December, 1922. (Tr., pp. 38-39.)

It was admitted that the Shelby Chemical Company was adjudicated a bankrupt about the 19th day of January, 1923. The witness further testified that the defendant had made an offer to buy the plant from the Government but the offer was declined first on the ground that the bid was not satisfactory and afterwards on the ground that the Government desired to sell the chemical plant at Shelby and one at Collinwood, Tennessee, at the same time and that neither would be sold separately; that the amount which defendant offered to pay to the Government was two hundred and ten thousand dollars in cash. The witness submitted photographs of the chemical plant and of the plant of the Iron Company and testified that the two plants were absolutely tied up together and that the chemical plant could not be operated separate and apart from the Iron Company's plant, except at great inconvenience, loss and disadvantage to the Shelby Iron Company; that the Chemical Company had to have steam, electrical energy and large quantities of water and waste heat from the stoves; that there were no facilities for supplying those things except through the agency of the Shelby Iron Company and there were none for switching cars except through the agency of the Shelby Iron Company; that in order to do switching it would be necessary to use the Iron Company's tracks, which would be a great disadvantage to any outside company operating through defendant's yards and would make an impossible oper-

ating proposition; that the two plants were closely intertwined and interlinked in construction, as much so as if they had been one plant; that it was so arranged for saving expense to the Government and getting efficiency by having the plants close to the boilers and blast furnaces and that a third party could only operate the chemical plant at great expense to himself and detriment to the defendant; that at the time the contract was made between the Iron Company and the Chemical Company, the Iron Company of New Jersey owned the properties and had owned them for about 27 or 28 years and also owned the blast furnaces and surrounding properties; that formerly the Shelby Iron Company of Alabama had owned them and conveyed them to the Alabama Coal and Iron Company, a New Jersey corporation, the name of which was changed to the Shelby Iron Company; that the officers of the two companies are the same and that the New Jersey Company owns the stock of the Alabama Company; that the Alabama Company has no assets and does not function in any way; that he understood the reason why the separate organization was retained was because the Shelby brand of pig iron was very valuable and it was feared that some company might be organized in Alabama under the name of Shelby Iron Company or some similar name and put out a brand of iron that would be confused with that of the Shelby Iron Company; that where it was recited in the two deeds that the grantor was the Shelby Iron Company of Alabama, he presumed it was the mistake of the attorneys drawing up the deeds; that the Shelby

Iron Company of New Jersey usually designated itself as the Shelby Iron Company of New Jersey, although the style of the name used on defendant's letterheads was Shelby Iron Company; that at the time he entered into the contract with the Shelby Chemical Company, he was authorized to do so by the Board of Directors of the Iron Company of New Jersey and was also authorized by them to transfer the property by warranty deed; that he did not discover the error in the description of the grantor in those deeds until three or four months before the trial; that the contract between his company and the Chemical Company was signed a few days in advance so the Government would sign the other contract, which the Government refused to sign unless they knew they had a source of supply; that Matthews, the president of the Shelby Chemical Company, informed him that he could not secure his contract with the Government until he had secured from defendant or someone else a contract giving a supply of wood, water, power, housing facilities, etc.; that he was informed by Matthews that the property would have to be conveyed to the Government and that he complied only on the basis that if the Government did not sell the plant, it would be reconveyed and the plant moved; that he had no dealings with the Government but that he demanded of Matthews that such provision be put into the contract; that the Government had knowledge of the contract when it was made, that it was written into the contract between the Chemical Company and the Government; that negotiations were on for some time between the Chemical Company and

the defendant for the former to buy the plant of the defendant and that during that time he informed the agent of the Government that he was not interested in the purchase of the chemical plant, but that if the Chemical Company did not buy defendant's plant, the defendant would like to consider the buying of the chemical plant; that in the contract between the Chemical Company and the defendant, the latter had the right to buy the plant or to say that it should be removed and the land reconveyed; that defendant made an offer in cash to make the Government whole by paying it two hundred and ten thousand dollars in cash, which was the balance due the Government under the contract it had with the Chemical Company to sell the latter the plant for two hundred and sixty thousand dollars of which fifty thousand dollars had been paid; that he notified General Patrick, of the Air Service, who was authorized to sell the chemical plant, that defendant would object to the sale of the property to any third party and told him the reasons why and what defendant's legal rights were; that after making the bid of two hundred and ten thousand dollars in cash, defendant was granted ten days within which to submit a revised bid, that he discussed it with General Patrick and when informed that no bid on that plant alone would be considered because the Government was going to sell the two plants together, he did not put in any further bids; that defendant never had any information or notice of the subsequent contract between the Government and the Shelby Chemical Company (which will be hereinafter referred to) prior

to the time the dispute arose, except that he had been informed by Matthews that he had bought the plant; the only information he had about the matter was from Matthews, who told him that he had bought the plant, from which he supposed that Matthews was carrying out the original agreement. (This testimony is found on pages 38 to 48, inclusive, and pages 55 to 58, inclusive, of the transcript.)

Major James A. Willis testified that he was an officer in the United States Army and was Chief of the Legal Section of the Sales Division in the office of the Assistant Secretary of War; that he had had conversations with Mr. M. W. Bush and some letters from the Shelby Iron Company relative to the purchase of the chemical plant at Shelby, Alabama; that he had told Mr. Bush that the Chemical Company was in default and that the Government proposed to take over the plant and sell it; that afterwards he was told by Mr. Bush on Monday, the 16th day of October, 1922, that he was not in a position to make any offer for the plant and that afterwards he was informed by Bush that he had arranged to sell the properties of the Shelby Iron Company and would not be interested in the purchase of the chemical plant; that after the war an adjustment of the former contract between the Shelby Chemical Company and the Government was had and the plant was sold to the Shelby Chemical Company under a contract whereby they were to pay, as he remembered, two hundred and sixty thousand dollars but the Government retained title until the purchase price should be paid; that the parties who were negotiating with Bush

for the purchase of the Iron Company's plant were also negotiating with the Government for the purchase of the Chemical Company's plant and continued for months trying to purchase it up until February, March or April of the year 1922. That the trade for the sale of the chemical plant by the Government to the Bon Air Coal and Iron Company was practically closed in February, 1922, but the contract was not signed until March; that the Government was under contract to deliver the property to the Bon Air Coal and Iron Company but had not delivered possession nor made a deed; that the Bon Air Coal and Iron Company had not paid the consideration but were prepared to pay it, as he understood. (Tr., pp. 49 to 55, inclusive.) The contract between the Government and the Shelby Chemical Company by which the chemical plant was sold to the Chemical Company under a lease sale contract, providing for the payment of fifty thousand dollars in cash and two hundred and ten thousand dollars on time, was offered in evidence and is found on pages 118 to 145, inclusive, of the transcript.

Decree.

The Court found that the defendant had a right to a reconveyance of the land to it from the Chemical Company when the contract between it and the Chemical Company terminated, which the United States was due to respect; that as the contract was terminated before its expiration through the fault or bankruptcy of the Chemical Company, the same right to a recon-

veyance would exist and that this right was available as against complainant upon either of two theories: first, if there was an equity between the defendant and the Chemical Company by which the defendant was entitled to a reconveyance of the land upon the termination of the contract, it was prior in point of time to plaintiff's equity, whether the latter arose under the original or subsequent contract between complainant and the Chemical Company; that the complainant being without the legal title, the equity prior in point of time must prevail, and, second, that complainant must be held to have contracted with the Chemical Company with notice of the Iron Company's equity to demand a reconveyance from the Chemical Company; that complainant had notice when it contracted with the Chemical Company of the terms of the contract between the Chemical Company and the Iron Company; that complainant had notice of defendant's equity, as to a reconveyance of the land, before it made its contract with the Chemical Company, and was not a purchaser without notice. It was accordingly decreed by the Court that while the complainant had an equity for the reformation of the deed as prayed in the amended bill, the defandant had a prior equity to have the land reconveyed to it on the termination of the contract between the Shelby Chemical Company and the Shelby Iron Company, which contract had been terminated by the bankruptcy of the Shelby Chemical Company and its subsequent inability to perform the contract, but that complainant was entitled to remove from the lands

all the buildings and equipment constituting the chemical plant and that complainant should have six months from the date of the decree within which to make such removal. The opinion of the court and its decree are found on pages 59 to 73, inclusive, of the transcript.

Propositions of Law.

I.

The deeds of June 11th and June 18, 1918, did not operate to convey the legal title to Shelby Chemical Company. There being no latent ambiguity on the face of the deeds, parol evidence would not be admissible in a court of law, or even in a court of equity (except on bill to reform), to show that the deeds were really executed by Shelby Iron Company of New Jersey instead of by the Shelby Iron Company of Alabama, as they purport to be.

Pitts *v.* Brown, 49 Vt., 86; 24 Amer. Rep., 114.
Crawford *v.* Spencer, 8 Cush. (Mass.), 418.
22 C. J. 1194 and Cases Cited in Notes.
Bradley *v.* Washington Steam P. Co., 13 Pet., 89; 10 L. Ed., 72.

II.

But even if such deeds did operate to convey the legal title, in either aspect of the present case, whether considered as a bill to quiet title or as a bill to reform, it was the duty of the court to determine whether the

defendant had any title to, interest in, or claim upon the land.

Jenkins *v.* Jonas Schwab Co., 138 Ala., 664.
Pace *v.* Robertson Banking Co., 202 Ala., 343.
Weaver *v.* Eaton, 139 Ala., 247.
Coburn *v.* Coke, 193 Ala., 364.
Kelly *v.* Coke, 193 Ala., 271.
Interstate Bldg. & Loan Ass'n *v.* Stocks, 124 Ala., 109.

III.

The right of a party seeking reformation of a deed must rest on an equity superior to that of him against whom it is sought. The power is exercised with great caution and in the absence of definite allegations and certain proof that there is an existing superior equity, the remedy is not authorized.

Keith *v.* Woodruff, 136 Ala., 443.
Teakle *v.* Teakle, 29 Ala., 403.
34 Cyc. 905 and Cases Cited in Note.

IV.

The remedy by suit in equity to reform a written instrument is not absolute. It is discretionary with the court whether under all the circumstances the remedy is necessary to complete the ends of justice.

34 Cyc. 907 and Cases Cited in Note.

V.

When the United States comes into court to enforce its rights, it comes as any other suitor and the courts

decide on the rights of a citizen in controversy with the Government according to equity and good conscience between citizens. The ordinary rules prevail as in actions between private individuals.

Rhode Island *v.* Mass., 12 Pet., 657; 9 L. Ed., 1233.

Brent *v.* Banks, 10 Pet., 596; 9 L. Ed., 547.

Mitchell *v.* U. S., 9 Pet., 711; 9 L. Ed., 283.

U. S. *v.* Castillero, 2 Black, 17; 17 L. Ed., 360.

U. S. *v.* Arrendondo, 6 Peters, 691; 8 L. Ed., 547.

Smoots Case, 15 Wall., 36; 21 L. Ed., 107.

U. S. *v.* State Bank, U. S., 30; 24 L. Ed., 647.

Aldrich *v.* Chemical National Bank, 176 U. S., 618.

Leary *v.* U. S., 14 Wall., 607; 20 L. Ed., 756.

VI.

The law imputes knowledge when opportunity and interest, coupled with reasonable care, would necessarily impart it, and whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led.

Woolersak *v.* Reiger, 115 U. S., 96; 29 L. Ed., 350.

Wood *v.* Carpenter, 101 U. S., 135; 25 L. Ed., 807.

McQuiddy *v.* Ware, 20 Wall., 14, 22; L. Ed., 311.

Livingston *v.* Maryland Ins. Co., 7 Cranch, 506; 3 L. Ed., 421.

Simons Creek Coal Co. *v.* Doran, 143 U. S., 417.

VII.

It is a general rule that a paper which expressly refers to another paper within the power of the party, gives notice of the contents of that other paper, and where inquiry is a duty whatever is sufficient to put one upon inquiry is sufficient to charge him with notice of what that inquiry would have led to.

Livingston *v.* Maryland Ins. Co., 7 Cranch, 506; 3 L. Ed., 421.

Brush *v.* Ware, 15 Pet., 93; 10 L. Ed., 672.

Goodman *v.* Simonds, 20 How., 343; 15 L. Ed., 934.

Angle *v.* Northwestern Mutual Life Ins. Co., 92 U. S., 330; 23 L. Ed., 556.

Martin *v.* Webb, 110 U. S., 7; 28 L. Ed., 49.

ARGUMENT.

No Misnomer in Deed.

No multiplication of authorities is necessary to support the principle asserted in proposition one above. It is entirely consistent with appellant's contention that a misnomer will not invalidate a grant to or by a corporation. It is not true, however, that in every case it can be shown by parol evidence that there was a mistake in the name of a grantor corporation. As we understand the rule, which is applicable to a case of this kind, where a question of the legal title to land is involved, such mistakes can be shown by parol only

where there is a latent ambiguity which appears on the face of the deed.

In the case of Crawford *v.* Spencer, 8 Cush. (Mass.), 418, it was held that on the trial of a writ of entry for recovery of land, it was not permissible to show that the name of James Maxwell Crawford was inserted in the deed by the grantee by mistake and that the intention of the parties was to convey the land to George Crawford, who paid the purchase money and went into possession. The Court uses the following language:

> "Here is a plain grant to the defendant and no fraud in the execution of it is suggested. Nor does any extrinsic fact raise a latent ambiguity as to the true grantee, so as to admit explanatory parol evidence. The testimony which was offered merely shows a mistake, which the court has no authority in any way to correct. The premises passed to the defendant by force of the deed and evidence to combat the deed or to control its effect was rightly rejected."

In the case of Pitts *vs.* Brown, 49 Vt., 86; 24 Am. Rep., 114 it was held not to be permissible in an action of ejectment to show that a deed to Rufus Vallett was really made to Russell Vallett and that writing the name of Rufus in the deed was a clerical error. The court said that such evidence would in its legal effect operate to reform the deed, which was not allowable in a court of law. The court says:

> "There is no ambiguity apparent upon the face of the deed. Where a latent ambiguity exists, it is sometimes allowable to explain it by

> parol, as, in the case of a will, to ascertain the person where there are two of the same name, Lord Cheney's case, 5 Co., 468; A. Ulrich *vs.* Litchfield, 2 Atk., 372; Parsons *v.* Parsons, 12 Ves., 266; Thomas *v.* Thomas, 6 Tenn., 671. And a grant may be good though the grantee's name of baptism be a mistake (Coke Litt., 3*a*) as, where lands were given to Robert, Earl of Pembroke, when his name was Henry, the grant was held good, because there could be but one of that name and dignity. The old rule was that in the case of deeds or grants an omission or mistake of the Christian name of the grantee rendered the grant void. The exceptions to that rule were, when, from the deed or grant, with the aid of extrinsic evidence, it could be ascertained with certainty what was meant or intended, and in this class of cases, resort must be had to a court of equity for reformation of the deed or grant."

In the present case we have no "misnomer" of a corporation. If the deed had used the name of Shelby Iron Company of Alabama, when in fact there was no such corporation as the Shelby Iron Company of Alabama, but there was a corporation by the name of Shelby Iron Company organized under the laws of New Jersey, it would be permissible to show the real facts because it would involve no contradiction of the deed. Here, however, if appellant's contention is right, the court would be justified in an action at law in admitting testimony to show that, although the deed purported on its face to be made by the Alabama corporation, it was in fact made by the New Jersey corporation. Prac-

tically all of the cases cited in appellant's brief are perfectly consistent with the rule which we are insisting upon.

In the case of Wakefield *v.* Brown, 38 Minn., 361, there was a latent ambiguity in the deed, the property involved having been conveyed by John O. Bremius under the name of James O. Bremius, this name having been used in the body of the deed. It did not appear that there was any such person as Jas. O. Bremius and it was held competent to show that the grantor executed it under the assumed name of James O. Bremius or that the scrivener made a mistake in the Christian name of the grantor who signed the deed as J. O. Bremius. This involved no contradiction of the deed. On precisely the same theory the cases of Fallon *vs.* Kehpe, 38 California, 44; Hommell *v.* Devering, 39 Mich., 522, and other cases cited in appellant's brief were decided. On this point, however, it should suffice to say that appellant by its amended bill alleged that the deed was executed, not by the Shelby Iron Company of New Jersey, but by the Shelby Iron Company of Alabama, that it was so made by mistake and a reformation of the instrument was prayed for. We submit that appellant cannot now be heard to say in opposition to the averment of its bill that the deed was not in fact made by the Shelby Iron Company of Alabama, but was in fact made by the Shelby Iron Company of New Jersey.

SECOND

Duty of Court to Ascertain Defendant's Interest.

But even if the deeds were sufficient to convey the legal title to the Shelby Chemical Company, yet, nevertheless, whether the bill be considered as one to quiet title or as one to reform the two deeds, it was the duty of the Court below to determine whether, in the one aspect, the defendant had any right, title, interest or claim to the land and in the other aspects whether it had an equity superior to that of complainant.

In the case of Jenkins *vs.* Jonas Schwab Company, 138 Ala., 664, it was held that the statute with reference to quieting title gives a remedy for the determination of every claim of interest adverse to the ownership of the one filing the bill. The same doctrine is asserted in the case of Weaver *vs.* Eaton, 139 Ala., 247, and in Pace *vs.* Robertson Banking Co., 202 Ala., 343.

Under the other aspect of the bill, viz, that of reformation, it is well settled by the authorities that the right of a party seeking reformation must rest on an equity superior to that of him against whom it is sought. 34 Cyc., 905 and cases cited in note. This is but another statement of the doctrine that he who seeks equity must do equity and that when a court of equity takes charge of a case it is its duty to determine all of the equities as between the parties and to enter such a decree as the justice of the case may demand.

We turn next to the consideration of what interest, claim or title the defendant may have in the land and what equity it may have in respect of having the land conveyed back to it. In the contract between the defendant and the Chemical Company it was stipulated that the defendant should convey to the Chemical Company sufficient ground on which to construct the plant and buildings that were to be erected and this language is used in reference to the conveyance of the land to the Government: "Inasmuch as the United States Government will be financially interested in the construction of the Chemical Company's plant, it is expressly agreed that said real estate may be deeded to and vested in the United States Government *during the period of a contract between the Chemical Company and the United States Government, said contract to extend for the duration of the war.*" (Italics ours.) See transcript, page 16. It was further provided in that contract that upon its termination the Chemical Company would reconvey to the defendant all of the lands free and clear of any encumbrances or liens whatsoever. (Tr., p. 17.) It is perfectly clear, therefore, that the contract contemplated that the title to the property should be vested in the United States for a period only, which was not to extend beyond the duration of the war. It is also perfectly clear that upon the termination of the contract, which by its terms was to expire April 1, 1923, or at the end of a five-year renewal period thereafter, the defendant would have the right as against the Chemical Company to require a reconvey-

ance to it of the land. We submit, furthermore, that there can be no question that as between the defendant and the Chemical Company the former did have a right to such reconveyance before April 1, 1923, if by reason of bankruptcy of the Chemical Company or other cause it had become disabled on its part from carrying out the terms of the contract, thereby bringing about precisely such a termination as would have resulted if the contract had been performed up to April 1, 1923. Pretermitting for the moment the question as to whether complainant had notice of this equity on the part of the defendant, let us consider whether the Chemical Company had any right to a reconveyance of the land after the termination of the war. In the last paragraph of Article VII of the contract between complainant and the Chemical Company (Tr., p. 25) the following provision is found:

> "It is agreed, however, that in case the Government takes over said plant *or* undertakes to operate it by reason of default of the contractor *or for any other reason*, the Government's rights to operate the same shall, except as may be expressly provided by statute, cease and terminate at the end of the present war. If at that time the sale of said plant to the contractor shall have been consummated, the Government will surrender possession thereof to the contractor and if said plant is then still owned by the Government it shall at its own expense within six months from the end of said war remove all buildings and equipment constituting such plant from the ground upon which the same are

> erected and shall without further consideration reconvey such ground to the contractor." (Italics are ours.)

It will be seen that the agreement of the Government to reconvey the land is not conditioned upon its taking over the plant *and* undertaking to operate it. The words are that if it takes over the plant or undertakes to operate it. And the further provision is, that if at the end of the war the plant is still owned by the Government, it shall remove the buildings and equipment and reconvey the ground to the contractor. As has already been seen, this provision was inserted at the instance of the defendant. It would not enter into the contract with the Chemical Company until such provision was inserted into the contract between the Government and the Chemical Company. It is perfectly plain, therefore, that the Chemical Company had a right to require a reconveyance of the land to it upon the termination of the war. It is likewise perfectly plain that if the Government had notice of the rights of the defendant under its contract with the Chemical Company, it could not by any subsequent agreement with the Chemical Company, as against the defendant, abrogate and annul the provision requiring a reconveyance of the land to the Chemical Company, particularly in view of the fact that it was recited in the contract between the Chemical Company and the defendant that the real estate should be "deeded to and vested in the United States Government during the period of a contract made between the Chemical

Company and the United States Government, *said contract to extend for the duration of the war.* (Our italics.) (Tr., p. 16.) The further provision in the last-mentioned contract to the effect that the Chemical Company was to become the owner of the land, buildings, equipment and improvements if an enabling statute to that effect should be passed by the Congress of the United States has become inoperative for the reason that such an enabling statute was passed.

This provision was inserted for the benefit of the Chemical Company merely and was, no doubt, intended to operate mainly with reference to the plant and improvements on the land, relieving the Chemical Company from liability to convey, if it was not in its power to do so. Certainly, it was never intended thereby to enlarge the rights of the Government so as to enable it to acquire the land for any period beyond the duration of the war. The apparent inconsistency, in the Government's contract with the Chemical Company, between the provision that the Government was to acquire a good title to the land and the further provision that the land was to be reconveyed to the Chemical Company at the end of the war, is explainable on the theory that the last-mentioned provision was inserted after the contract had been prepared at the demand of the Iron Company. It will be noted that in the contract between the Government and the Chemical Company it is recited that the obligation of the Government to sell the plant to the Chemical Company is conditioned upon its having the legal authority to make such sale and conveyance. As well

said in the opinion of the District Court: "Reading the contracts together, it can be deduced that the plaintiff and defendant and the Chemical Company fully understood that the Government was to retain title to the land only for the purpose of and during the period of operation of the plant for it or by it and that the contractor was to retain title to the land only during the period of the existence of an operating contract between it and the defendant. For the purpose of securing reimbursement for advances made the Chemical Company, the Government looked not to ownership of the land but to the reserved right of removing the plant within six months after operations had ceased, agreeing then to reconvey the land to the contractor without regard to the state of their mutual accounts. In no event was it contemplated that the Government would continue to own the lands after its right to operate or have operated the plant had ceased." (Tr., p. 76.)

THIRD.

Government Had Notice of Defendant's Rights.

We now come to consider whether the complainant, the United States Government, had notice of the rights of defendant under its contract with the Chemical Company. It has been settled by many decisions of the Supreme Court of the United States that when the United States comes into court to enforce its rights, it comes as any other suitor and the courts

decide on the rights of a citizen in controversy with the Government according to equity and good conscience between citizens. The ordinary rules prevail as in actions between private individuals. The doctrine is thus laid down in 26 R. C. L., 1437:

> "In the construction and interpretation of Government contracts, the same general rules apply as in the case of contracts between individuals. The fact that the Government is a party is not material so far as this rule is concerned. The rights of the parties should be governed by the terms of the written agreement, the express and unambiguous stipulations of which cannot be varied by parol. Such a contract should be construed with a view to ascertain the intention of the parties and to give effect accordingly, if that can be done consistently with the terms of the instrument. Where the language of a contract is susceptible of two meanings, the meaning of the parties may be explained by the circumstances attending the transaction. The courts may look not only to the language employed but to the subject matter and the surrounding circumstances and may avail themselves of the same light which the parties possess when the contract was made."

In the case of Brent *v.* The Bank of Washington, 10 Peters, 596; 9 L. Ed., 547, the court uses this language:

> "Thus compelled to come into equity, for a remedy to enforce a legal right, the United States must come as other suitors seeking in

> the administration of the law of equity, relief; to give which, courts of law are wholly incompetent, on account of the legal bar interposed by the bank. This court, in The United States *v.* Mitchell (9 Peters, 743), have recognized the principle in the common law that though the law gives the king a better or more convenient remedy, he has no better right in court than the subject through whom the property claimed comes to his hands. This principle is also carried into all the statutes, by which the appropriate courts are authorized to decide, and under which they do decide on the rights of a subject in a controversy with the king, according to equity and good conscience between subject and subject."

In the case of United States *v.* Arrendondo, 6 Peters, 691; 8 L. Ed., 547, this language is used:

> "The United States by consenting to be sued and submitting the decision to judicial action, have considered the controversy as a purely judicial question, which must be decided as between man and man, on the same subject matter, and by the rules which Congress themselves have prescribed."

In U. S. *v.* State Bank, 96 U. S., 30; 24 L. Ed., 647, it was held:

> "Where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of

> the wronged or injured party. The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty; and could confer no rights upon the principal. The rules of law applicable to individuals in such cases apply also to the United States."

If this controversy were between individuals, could there be any doubt that ordinary prudence would have required the individual making such a contract with the Chemical Company to inquire into the terms of the contract between the Chemical Company and another party under which the wood, steam, water, electricity and the land itself were to be furnished? The law imputes notice when opportunity and interest, coupled with reasonable care, would necessarily impart it, and whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. Cases cited under proposition VI above. As said in the lower court's opinion:

> "It is inconceivable that the plaintiff would have agreed to finance the Chemical Company in the construction of its plant to the extent of $400,000.00 unless and until it knew that the terms of the contract between the Iron Company and Chemical Company was such as to insure a successful operation by the Chemical Company. This could only have been determined through an inspection of the contract between the Iron Company and the Chemical Company."

Inspection of that contract would have shown that the land was to be conveyed by the Chemical Company to the Government for the duration of the war only, and would have further shown that the Chemical Company was to reconvey the land to the Iron Company on the termination of its contract with that company. It is a general rule that a paper which expressly refers to another paper, within the power of the party, gives notice of the contents of that other paper. Livingston *v.* Maryland Insurance Co., 7 Cranch, 506; 3 L. Ed., 421. It is generally held, moreover, that where inquiry is a duty whatever is sufficient to put one upon inquiry is sufficient to charge him with notice of what that inquiry would have led to. There can be no sort of doubt that reasonable, ordinary care would have required the officer who made the contract with the Chemical Company to make inquiry into the terms and provisions of the contract between the Chemical Company and the Iron Company. That he had notice that there was such a contract appears from this recital in the contract between the Chemical Company and the Government: "Whereas the contractor has a contract with the Shelby Iron Company of Shelby, Alabama, according to the terms of which the Shelby Chemical Company shall receive all the lumber it may require from timber lands owned and leased by the Shelby Iron Company in return for all charcoal derived therefrom." (Tr., p. 19.) That officer must be presumed to have exercised due and ordinary care in the premises and to have examined the provisions of the contract between the

Chemical Company and the Iron Company, upon which the success of the Government's undertaking so largely depended. He must have made inquiry, not only as to the cost of the plant itself but as to how the Chemical Company was to obtain, not only the wood but the water, steam, electricity and shipping facilities, which were necessary for the operation of the plant, as well as with respect to the land upon which the plant was to be located. Moreover, this officer has not denied that he did have notice of all of the terms and provisions of that contract between the Chemical Company and the Iron Company. That the officer did have such notice must be regarded as an accepted fact. Notice to him was notice to the Government. He was the officer designated by the President under the National Defense Act to enter into such contract in behalf of the Government. It is so recited in the Government contract and there has been no denial of the fact by anyone. It is not sought here to charge the Government with laches or neglect on the part of its agents or officials. The question is one of imputed notice. If the officer had full authority to make the contract he was the representative of the Government and its *alter ego* in that behalf and notice to him was notice to the Government.

Under the law the President had the right by executive order to authorize contracts to be made without advertising for proposals. The contract itself between the Government and the Chemical Company recites that it was a contract made by the United States of America "represented by A. C. Downey, Major Sig-

nal Corps, United States Army, hereinafter referred to as the Contracting Officer, acting by the authority of the Chief Signal Officer of the United States Army and under the direction of the Secretary of War." The contract further recites that it is made pursuant to the provisions of the law therein referred to and states in terms that "the President hereby places the following order with the Contractor," etc. Thereafter the Government proceeded with the execution of the contract by paying money thereon and receiving benefits therefrom and the Government will not now be heard to say that the contract was not duly authorized and was not executed by the proper officer. By the stipulation made in open court, it was admitted that the contract was duly and properly executed, which means that it was executed by the proper officer of the Government.

Without adding anything further upon the question of notice which as we submit is fully proven, we content ourselves with a reference to the opinion of the district court (Tr., p. 74) and the opinion of the circuit court of appeals (Tr., p. 83), both of those courts having found that the evidence established the fact that the Government had notice of defendant's equity. This Court will accept such successive findings as final.

Stuart vs. Hayden, 169 U. S., 1.

Baker vs. Cummings, 169 U. S., 198.

Towson vs. Moore, 173 U. S., 24.

Wright-Blodgett Company vs. U. S., 236 U. S., 402.

Washington Securities Company vs. U. S., 234 U. S., 78.

FOURTH.

Equity of Government Not Superior.

In view of what has already been said, it is hardly necessary, we think, to give much consideration to the point much stressed by the Government in the courts below that the equity of the Government was superior to that of the defendant. Let us briefly consider the matter, however, and see what the situation of the parties was. The Government, under the stress of war conditions, is in urgent need of acetate of lime and methyl alcohol. It finds the Shelby Chemical Company willing to enter into the manufacture of these commodities and to erect a plant for their manufacture, if the Government will furnish the money for the erection of the plant. The parties will make an estimate of what such a plant will cost and find it to be, under war-time conditions, about four hundred thousand dollars. But, besides the erection of the plant it is necessary to have land upon which to erect it, as well as a supply of dry wood and water, steam, electricity and switching facilities. The Iron Company is willing to furnish those other requisites if charcoal, one of the by-products, is furnished to it for its iron furnaces. It is willing to expend and does expend the sum of fifty thousand dollars in order to put itself into a position to supply these necessary requisites for the making of the lime and alcohol. The sole benefit to accrue to the Iron Company is the charcoal, which is agreed to be furnished to it. Necessarily, the Iron

Company must have some protection, if it is to convey the land and make such large expenditures, against a possibility of the land being transferred or conveyed to other parties who would be under no obligations to give it the charcoal. The plant of the Chemical Company is to be so combined and intertwined with that of the Iron Company that it must have protection against the possibility that the title to the land and the plant might pass to others with whom the Iron Company would have no contract relations and from which it could make no demand that the charcoal product should be furnished to it. It realized, no doubt, that it would be difficult enough to work harmoniously even with the Shelby Chemical Company with the plants commingled as they were, but it was willing to take that risk in order that the Government might be furnished with things that were needed for the carrying on of the war. To guard against such an impossible and unworkable condition as would arise if the ownership of the chemical plant should be in the Government after the war had ended or should pass from the Government into other hands, it was expressly provided in the contract, that while the Iron Company was to furnish the land, which could be conveyed to the Government, such conveyance was to be made for the duration of the war only and at the end of the war if the Government still owned the plant it should convey the title back to the Chemical Company and remove the plant therefrom within six months thereafter.

Obviously the removal of the plant from the land was deemed by the Government a sufficient provision

to protect its interest. That the Government should have the right to convey away the land to a third party after the end of the war was never contemplated for a moment, and on the contrary the right to do so is absolutely repelled and denied by the provisions of the two contracts above adverted to. For the reasons already urged, the Government had full notice of the rights of the Iron Company in respect to the land after the war should have terminated. The Government knew that the Iron Company was furnishing the land and that it was to furnish other things of great value, that the only benefit to be derived by it was the charcoal to be made, that it could not require such charcoal to be furnished to it by the Government itself, if it should take over the operation of the plant, or by any other party to whom the land and plant might be conveyed. The Government knew that the only protection that the Iron Company had against such an unhappy situation was the provision that the Government was to convey the land back to the Chemical Company with which the Iron Company did have a contract under which its rights could be protected. The provision in the contract between the Chemical Company and the Iron Company that the former was not to be obligated to convey the land back to the Iron Company except in the event it had acquired the title thereto from the Government was intended for the protection of the Chemical Company and must have had reference mainly to the Chemical Company's acquiring the ownership of the plant, although not very aptly expressed to that end. But certainly the Government had

no right to avail itself of that provision, or, in other words, to take advantage of its own wrong by refusing to convey the lands back to the Chemical Company, as it had obligated itself to do, and refuse to give any force and effect to the provision that the ground was to be deeded to it for the duration of the war only. To sum up the matter in a very few words: It was absolutely necessary for the protection of the Iron Company that the land should be conveyed back to the Chemical Company at the end of the war. That was the necessary thing to be done as was contemplated by all of the parties at the time the first contracts were made. The only protection that the Government required and the only one demanded by it was that it should have the right to remove the plant and machinery and equipment from the land, having six months within which to do so. Where is there any room then for the contention that the equity of the Government is superior to that of the Iron Company? We respectfully submit that there is none.

FIFTH.

Government Not Purchaser for Value.

If under the pleadings it had been competent for the Government to show that it was a bona fide purchaser for value, the question of notice would be the controlling one.

We shall undertake to show, however, that under the pleadings as framed and as the case was submitted to the lower court that defense was not available to the

Government as against the Iron Company's cross-bill or cross-claim. It is well settled that in equity the claim of a *bona fide* purchaser for value is an affirmative defense which must be pleaded.

In 2nd Pom. Eq. Jur. (4th Ed.), section 784, it is said, referring to the defense of a *bona fide* purchase and the necessity for pleading it: "If he neglects to put in a plea and fails to assert the defense in his answer, he cannot raise it or avail himself of it at any subsequent stage of the suit." To the same effect are Hanchey *vs.* Hurley, 129 Ala., 306; Kelly *vs.* Chandler, 184 Ala., 358; Wood *vs.* Holly Manufacturing Co., 100 Ala., 350.

In the case of Hooper *vs.* Strahan, 71 Ala., 65, it is said of a party claiming to be a *bona fide* purchaser: "In no appropriate manner does he bring before the court the claim of a *bona fide* purchaser without notice and his rights as such must be considered as eliminated from the case."

The following rules as to defense of *bona fide* purchase are set out and quoted with approval in the case of Wood *vs.* Holly Manufacturing Company, supra:

> "The rule is settled in this State, that in such cases (defense of *bona fide* purchase) it is required of a defendant, who is sub-purchaser, to aver in his plea or answer, clearly, distinctly and without equivocation, and with proper circumstantiality of detail, the following facts, (1st) that he is a purchaser from one in actual or constructive possession, who was seized or claimed to be seized of the legal title, at the same time briefly setting out substantially the

> contents of the deed of purchase, with date, consideration and parties; (2) that he purchased in good faith; (3rd) that he parted with value, paying money or other valuable thing, assuming a liability, or incurring an injury, stating the nature of the consideration fully; (4th) that he had no notice of complainant's equity, and knew of no fact calculated to put him on inquiry, either at the time of the purchase, or at or before the time he parted with the consideration."

In the case of Great Northern Railway Co. *vs.* Hower, 236 U. S., 702, 59; L. Ed., 798, the court uses the following language in reference to this kind of a defense: "*Bona fide* purchase is an affirmative defense which the grantee must set up in order to defeat the right of the railroad company to have a trust declared in the lands in question, if the bill is otherwise sufficient for that purpose. This matter was directly involved and considered in Wright-Blodgett Co. *vs.* United States, 236 U. S., 397, and it is only necessary in this connection to refer to that case." In the case of Wright-Blodgett Co. *vs.* United States, 236 U. S., 397, 59 L. Ed., 637, the court says that the rule as to this defense is thus stated in Boone *vs.* Chiles, 10 Pet., 177:

> "In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seized in fee, and in possession; that the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently

> of the recital in the deed. Notice must be denied previous to and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea must show how the grantor acquired title. * * * The title purchased must be apparently perfect, good at law, a vested estate in fee-simple. * * * It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. * * * Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser without notice, the case stated must be made out; *evidence will not be permitted to be given of any other matter not set out.*" (Our italics.)

There are many cases cited in the opinion as sustaining these rules and among other authorities cited is that of 2nd Pom. Ed. Jur., ***supra.***

We may regard it as well settled in the Federal courts, at least, that no one may avail himself of the defense of *bona fide* purchase without setting up the same in his answer and that the averments of such defense must be as full and as explicit as are stated in the opinion of the court last cited.

In this case, the equity of defendant to have the land re-conveyed to it was set up in the answer and was available to it under such answer, considered as an answer merely, and was likewise available to it under

its answer treated as a cross-claim or cross-bill. In the Government's answer to the cross-claim or cross-bill, which is termed a replication, there is not a hint or a suggestion that the Government was a *bona fide* purchaser for value without notice of defendant's equity. No evidence would have been available, therefore, to the Government to show that it was such *bona fide* purchaser, even if it had been offered. And if such evidence had been given it could not have helped the case of the Government, because, as said by the Supreme Court of Alabama, evidence without proper allegations is as unavailing as allegations without proof. But in point of fact, no such evidence was offered. No witness testified that the Government paid anything of value to the Shelby Chemical Company as a consideration for the deed made to it by the Shelby Chemical Company. Clearly, the recitals in the contracts between the Government and the Chemical Company are not evidence as against the Iron Company of the truth of such recitals. Neither is the recital in the deed from the Chemical Company to the Government, of one dollar in hand paid and other good and valuable considerations to the grantor paid, evidence against the Iron Company that any such consideration was in fact paid. It is so held in the case of Simmons Creek Coal Co. *v.* Doran, 142 U. S., 417; 35 L. Ed., 1063, where it is laid down that in an action to set aside deeds as a cloud on plaintiff's title the recitals in such deeds are not as against plaintiff proof of the payment of the purchase money. This principle is so well settled that no other citation of authorities on this

point is necessary. It follows then that as there was neither allegation nor proof that the Government was a *bona fide* purchaser for value of the land in controversy the proven equity of the Iron Company stands unrebutted.

Conclusion.

In the brief for appellant in the court below there were many imputations upon the honesty and fairness of the Iron Company and direct charges to the effect that that company was actuated by greed and a desire to speculate upon the necessities of the Government and that it is seeking to buy the plant at its own price. Little need be said in reply to these insinuations and charges because they are absolutely unsupported by a single word in the testimony. So long as negotiations were pending between Dow and his associates for the purchase of the Iron Company, it being contemplated that they would also purchase the Chemical Company's plant, the Iron Company was not interested in the chemical plant. But when it finally became apparent that Dow and associates would be unable to carry out their agreement with the Iron Company to purchase its plant, the President of the Iron Company went to Washington and, before any contract had been made by the Government for the sale of the plant, he offered to pay for it two hundred and ten thousand dollars in cash, which was the same amount for which it was afterwards sold to the Bon Air Coal and Iron Company—but whether the amount so to be paid by the Bon Air Company was to be paid in cash or what se-

curity the Government had for such payment, it is not made to appear. It was also claimed that the Iron Company was not only estopped but that it did not offer to do equity and did not come into a court of equity with clean hands. In the ninth paragraph of the Iron Company's answer and cross-claim is found the following: "Defendant hereby offers to do equity by purchasing said plant from the plaintiff at its fair and reasonable value or by allowing the plaintiff to remove said plant from the premises of defendant within a reasonable time to be fixed by the Court and to do and perform whatever else in equity and good conscience it ought to do to entitle it to the relief hereinafter prayed." To use a familiar phrase, comment would seem to be unnecessary. But in the light of this offer on the part of defendant, how can it be claimed that the Iron Company is seeking to take advantage of the Government and get the property at its own price? Further, how can it be claimed that the Government will sustain a great loss if the plant is to be removed from the land when the Government for its own protection inserted that provision in the contract? And where is there any evidence to show that the Government would sustain any loss by the removal of the plant and machinery and equipment? Certainly the Government had the right to insist upon the fulfillment of that condition of the contract and it could not be required against its will to sell the plant to the Iron Company. The latter by its answer and cross-bill offered to pay the reasonable value of the plant. The Government

did not close in with this offer and the court had no right to compel it to do so. The right reserved to it by the contract was to remove the plant and this right was given to it by the decree of the Court below. From any point of view, we respectfully submit that the decree of the Court below was correct and should be affirmed.

Edward H. Cabaniss

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Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 123.—October Term, 1926.

The United States of America, Appellant, *vs.* The Shelby Iron Company of New Jersey, and the Shelby Iron Company of Alabama.	Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

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[April 11, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This is a controversy over priority of equities in fifteen acres of land in Alabama, with a wood distillation plant thereon, between the United States and the Shelby Iron Company of New Jersey. The case involves the construction of a contract between the United States and the Shelby Chemical Company, on the one hand, and of a contract between the latter and the Shelby Iron Company of New Jersey, on the other. The first was for the construction and operation of the plant on the land to be conveyed by the Chemical Company to the Government with money to be furnished by the latter for the production of acetate of lime and methyl alcohol for use in the War. The second was entered into between the Chemical Company and the Shelby Iron Company of New Jersey in anticipation of the first. The Iron Company agreed to convey to the Chemical Company the needed land which was near the works of the Iron Company, and to furnish hard wood, water, workmen's houses and power necessary in the operation of the plant. The benefit which the Iron Company was to derive from the arrangement was the cheapness of cost in the charcoal to be made by the Chemical Company as a by-product of the process of distillation, and to be sold at a fixed price to the Iron Company for use in its blast furnaces situated in a large tract of timber land of which the Iron Company was the owner, and of which the fifteen acres here in question was a part.

The Chemical Company executed a warranty deed of the fifteen acres to the Government in intended compliance with its contract,

but the Iron Company had failed to convey the land to the Chemical Company as agreed by it. A deed was actually executed to the Chemical Company by an Alabama Company of the same name instead of the New Jersey Company that owned the land. The Alabama Company, a former owner of the land, was then an inactive company, the stock of which was owned by the New Jersey Company, and the directors in the two companies were the same. So the Government legal title failed for misdescription of the grantor.

This suit was a bill in equity to quiet title to the United States against the two companies, the Alabama Company and the New Jersey Company. The New Jersey Company relying on the misdescription answered and denied the title of the United States. Thereupon the Government amended its bill and asked that the deed be reformed. Then the New Jersey Company, which we shall hereafter call the Iron Company, answered by a recital of facts which, it claimed, showed that it has an equity in the fifteen acres of land stronger in right than that of the United States. This constitutes the issue in this case, for the mistake and misdescription are admitted and the right of the United States for reformation of the deed is conceded but for this claim.

The contract between the Iron Company and the Chemical Company was made April 8, 1918, and provided that the Iron Company should by warranty deed, free of all liens and encumbrances, for a nominal consideration, provide sufficient ground on which to build the plant of the Chemical Company. By subsequent clause, it says: "Inasmuch as the United States Government will be financially interested in the construction of the Chemical Company's plant, it is expressly agreed that such real estate may be deeded to and vested in the United States Government during the period of a contract made between the Chemical Company and the United States Government; said contract to extend for the duration of the War; and further" it is understood that the Chemical Company is about to construct its plant under a contract with the United States Government, by the terms of which the Chemical Company is to take the ownership of the land, buildings, equipment and improvements, if an enabling statute to that effect shall be passed by the Congress of the United States. Therefore it is distinctly agreed that the foregoing provision as to reconveyance

of the lands is subject to the obtaining of the title to said lands by the Chemical Company from the United States Government.

By the eighth paragraph, it was provided that the contract should last until April 1, 1933, with the right of the Iron Company to extend it further for five years upon notice to the Chemical Company; and that at the end of the contract, or its renewal, the Chemical Company should reconvey to the Iron Company all of the lands conveyed to it by the Iron Company without cost to it, free and clear of any encumbrances or liens whatsoever, or if there were any mortgages on the same not yet due, the Chemical Company should pay over to the Iron Company the amount thereof or the amount of any bonds outstanding thereunder, with any accrued interest thereon, and should, if the Iron Company so elected, sell to it all the improvements, equipment and other personal property placed on the lands of the Chemical Company.

Thereafter, on April 28, 1918, the government contract with the Chemical Company was made. It was estimated that the plant would cost over $400,000, which the United States agreed to advance and reimburse itself by deductions from payment to be made from the sale by the Chemical Company to the Government of the acetate of lime and the methyl alcohol.

Among the preliminary recitals in the contract is this:

"Whereas the contractor has a contract with the Shelby Iron Company of Shelby County, Alabama, according to the terms of which the Shelby Chemical Company shall receive all the lumber it may require from timber land owned and leased by the Shelby Iron Company in return for all charcoal derived therefrom".

This recital becomes important on the question of notice hereafter to be considered.

The Government contract in its first Article provided that the Chemical Company, the contractor, was to convey to the United States a tract of land at Shelby, Alabama, of adequate size and suitable location, for the erection of the plant thereafter described. The conveyance was to be made subject to and upon the completion of an opinion by the Attorney General that by the conveyance the Government would derive an absolute title to the premises in fee simple, free and clear of all encumbrances, and that the United States should have the right to expend money for the erection of improvements thereon.

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By Article II the contractor agreed to erect and construct for the Government on the land a properly equipped wood chemical plant with a certain capacity, to be completed in five months, to be paid for by the Government at cost, the particulars of construction to be embodied in a separate contract.

The third Article provided for the retention of 40 per cent. of the price of all sales to the Government for the products of the manufacture to yield 6 per cent. interest on the government investment in the plant and to constitute a depreciation and amortization fund for the benefit of the Government.

By the fourth Article the contractor agreed to sell and deliver to the Government the entire output of the acetate of lime and the methyl alcohol, and the Government agreed to buy it, during a period of 18 months and then for the duration of the War, at certain agreed prices and on certain conditions.

By the sixth Article it was provided that when the depreciation and amortization fund and the purchase fund provided should together equal the cost to the Government, with interest at 6 per cent., of the Government's investment, or at any earlier date at the option of the contractor, the Government should sell to the contractor, and the contractor should purchase the plant, machinery and equipment at the then fair market value to be fixed by appraisement. The obligation of the Government to sell the plant was conditioned upon its having legal authority to make such sale and conveyance.

Article VII provided that the Government might take possession of the plant and operate it on failure of the contractor to comply with the terms of the contract, but its right to operate should cease and terminate at the end of the War. If at that time the sale of the plant to the contractor should have been consummated, the Government was to surrender possession to the contractor, and if the plant was then still owned by the Government, it should at its own expense, within six months from the end of the War, remove all buildings and equipment constituting such plant from the ground upon which the same were erected, and should without further consideration reconvey such ground to the contractor.

Article 17 provides that in the event of an armistice, the Government at its option might terminate the agreement, but in such event the contractor should receive from the Government the un-

paid purchase price of the product then actually manufactured, and the contractor should receive further from the Government a sum sufficient to protect him against his actual net expenditures and actual net outstanding obligations incurred in the manufacture. Then the value of the plant, machinery and equipment should be determined by appraisal, as already provided, and the Government should sell and the contractor should purchase the plant and equipment at the appraised value; and in making the settlement the contractor should be given credit on account of the purchase price for the 35 per cent. of the purchase price of the products theretofore sold to the Government and by it retained for security.

After the plant had been partially constructed, and $260,000 was still owing to the Government from the Chemical Company, a new contract was made between them dated January 25, 1919, whereby the Government should become the absolute owner of the property free of all claims, and the Government should lease to the contractor for three years the property, the contractor to pay to the Government $50,000 down on account of the rental, and in one year $50,000 more, and in two years $75,000, and in three years $85,000, all of which was to apply as rental for the property. The company was to pay all the taxes. It was further provided that should the contractor complete the plant, then at the expiration of the three years the Government, for the consideration of one dollar, would convey the whole property to the contractor or should the contractor, not being then in default for any unpaid payments required to be paid by it under the terms of the contract, desire at any time to purchase the property, the Government would sell it for a sum equal to the difference between $260,000 and the total sum of rents then paid. It was agreed in the contract that should the contractor at any time default in any of the payments required to be made to the Government in the lease, the Government might waive such default or treat and regard the lease and obligation and privilege to purchase as forfeited, or treat and regard the lease as a continuing legal and binding obligation, but the obligation and privilege to purchase was to be forfeited.

The president of the Iron Company denies that it had knowledge of this second contract. The plant was completed under the second contract, and charcoal was made and delivered to the Iron Company till 1922 in March. The Government took over the plant in De-

cember, 1922, and the Chemical Company became a bankrupt in 1923.

It is clear that the effect of the purported contract of lease of January, 1919, was that of an equitable mortgage. The rentals to be paid were the installments of the amount due under the original contract from the Chemical Company for the amount of money which the Government had advanced, less that which it had already received, and upon payment of the rental stipulated, the title was to revert to the Chemical Company, while the Government reserved the power to take over the property in case of default or bankruptcy of the Chemical Company. Its default gave to the Government the right to enforce against the land and the plant the debt due under this equitable mortgage. *Peugh* v. *Davis*, 96 U. S. 332, 336; *Robinson* v. *Farrellt*, 16 Ala. 472, 75 Ala. 109, 111; *Moses* v. *Johnson*, 88 Ala. 517, 520; *Love* v. *Butler*, 129 Ala. 531, 537, 538.

The remedy which we think the Government is entitled to, unless it is to be defeated for the reasons about to be examined, is not the reforming of a deed and a decree compelling the Shelby Iron Company of New Jersey to substitute its own deed to the Chemical Company for the useless and void deed of the Shelby Iron Company of Alabama. It is rather to give to the Government leave to reframe its pleadings so as to set up therein its ownership of an equitable mortgage upon the land and the plant to be enforced by a sale thereof and the proper distribution of the proceeds. Of course we might affirm the action of the Circuit Court of Appeals with a provision in the affirmance that it should be without prejudice to the beginning of an original suit by a new bill in equity setting forth the equitable mortgage as against the Iron Company, and asking its enforcement, and, if need be, its foreclosure against the land and the plant. We think, however, that it is wiser and better and shorter to end the litigation in this one proceeding.

The Iron Company objects to this action by the Court, on the ground that it has conflicting equitable rights that should defeat any recovery under the alleged mortgage. It insists that under the original contract as construed in the light of its contract with the Chemical Company, the title of the Government to the land and plant, even if it had been perfected as a legal title, was to

terminate at the end of the war, and that the Iron Company was entitled as against the Chemical Company and the Government to the reconveyance of the land. It further insists that the Government knew of this limitation upon its right to retain the ownership of the property as shown in the contract between the Iron Company and the Chemical Company and that its only security was in the power reserved to it by the original contract between it and the Chemical Company to remove from the land the plant within six months and this it has not exercised and refuses to do so. It shows that it expended $50,000 in preparing for the changes due to the installation of the plant by the Government and has suffered loss by failure of the Chemical Company to comply with its contract. It further says that the fifteen acres of land is so related to the larger tract of which it was a part that its use and control is essential to its operation of its blast furnace, and that it offered to pay the balance of $210,000 for the transfer of the Government's whole interest in the land and plant to it. It urges that as between it and the Chemical Company, it became entitled to a reconveyance and to take possession of the land because of the breach and bankruptcy of the Chemical Company as a termination of the contract as if it had expired by limitation. This presents an issue as to the notice which the Government had of the Iron Company's claim under its contract.

The argument of the Iron Company is that the recital in the government's contract that the Chemical Company would receive under a contract with the Iron Company all the lumber it might require from timber lands of the Iron Company in return for all charcoal derived therefrom, put the United States on notice of everything contained in the contract between the Chemical Company and the Iron Company in respect of the title to the land and the future plant. It relies on the principle that the law imputes knowledge when opportunity and interest, coupled with reasonable care, would necessarily impart it, and that where one paper refers to another paper within the power of the party, it gives notice of the contents of the other paper to that party. We have no quarrel with this rule as to constructive notice, but we do not think that it applies here. The reference in the first paper to require examination of the second must be one that indicates that both are dealing with a subject matter to which inquiry would be

relevant. Here the relevant object of the injuiry would have been the title to the land and the plant upon it. The recital does not refer either to the land or the title to it, but to the furnishing of wood by the Iron Company. To charge one with notice, the facts must be such as ordinarily to excite inquiry as to the particular fact to be elicited. *Rogers* v. *Rawlings*, 298 Fed. 683; *Muller* v. *Engell*, 75 Ky. 441; *Hyde Park Supply Company* v. *Peck-Williamson Heating Company*, 176 Ky. 513; 2 Pomeroy's Eq., section 629, pp. 1208, 1209.

We think, therefore, that the question of notice must be reexamined and that the issue must be not of implied notice but of actual notice. It was contended that one of the officers acting for the Government was in such a position that he probably knew what the contents and the effect of the contract between the Iron Company and the Chemical Company was in reference to the tenure of the Government in the land, and that the fact that he was not called to testify on the subject was a circumstance tending to sustain the claim that the Government had actual notice. The Iron Company will have the opportunity to present this and other evidence to the trial court upon the issue of such actual notice when the pleadings are reframed.

Counsel for the Government make a further argument to show that even if the Government had had notice of the contents of the contract between the Iron Company and the Chemical Company, its purpose and effect could not in any way impair the effect of the equitable mortgage the Government acquired under its second contract and so-called lease to the Chemical Company. They say that the Iron Company in its contract with the Chemical Company, and in its 8th paragraph thereof, manifests clearly an expectation and consent that the Chemical Company might encumber the land and the plant with liens or mortgages, and relied only on the credit and obligation of the Chemical Company in reconveying to the Iron Company, to clear off mortgage liens or bonds which the Iron Company evidently thought the Chemical Company might create. If this is the correct view, an equitable mortgage of the Government of the land and the plant in which it had an interest to the extent of $260,000, must be clearly superior to the equity of the Iron Company growing out of the obligation of the Chemical Comyany to reconvey the land to the Iron Company. Neither the District Court nor the Circuit Court of Appeals considered this phase of the

case. It may not have been presented to them. Their consideration was chiefly given to the issue of misdescription and to the meaning of the clauses providing for reconveyance of the land and improvements by the Government in the contract between the Government and the Chemical Company. We do not now consider and pass upon the contention of the Government in these regards. We only refer to it to have it clearly understood that when the cause goes back, nothing in what we have said shall prevent a showing of actual notice to the Government of the claim of the equity of the Iron Company in the land by virtue of its contract with the Chemical Company on the one hand or the construction of the 8th paragraph of that contract as a reason for maintaining the priority of the Government's equitable mortgage, whether it had notice of the Iron Company's contract or not, on the other.

The decree of the Circuit Court of Appeals will therefore be reversed and the cause remanded to the District Court for a reframing of the pleadings and for further proceedings not inconsistent with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.